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H.R. 1032—DEPARTMENT OF VETERANS AFFAIRS  
EMPLOYMENT DISCRIMINATION ACT

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Y 4. V 64/3: 103-7

H. R. 1032 - Department of Veterans... RING

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS

HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

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MARCH 30, 1993

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Printed for the use of the Committee on Veterans' Affairs

Serial No. 103-7

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DEPARTMENT OF VETERANS AFFAIRS



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# H.R. 1032—DEPARTMENT OF VETERANS AFFAIRS EMPLOYMENT DISCRIMINATION ACT

TUESDAY, MARCH 30, 1993

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON VETERANS AFFAIRS,  
*Washington, DC.*

The committee met, pursuant to call, at 9 a.m., in room 334, Cannon House Office Building, Hon. G.V. Montgomery (chairman of the committee) presiding.

Present: Representatives Montgomery, Applegate, Evans, Penny, Rowland, Slattery, Kennedy, Sangmeister, Long, Edwards of Texas, Waters, Filner, Gutierrez, Baesler, Bishop, Clyburn, Brown, Stump, Smith, Bilirakis, Hutchinson, Everett, Buyer, Quinn, and Linder.

## OPENING STATEMENT OF CHAIRMAN MONTGOMERY

The CHAIRMAN. The hour has arrived. Today's hearing is on H.R. 1032, the Department of Veterans Affairs Employment Discrimination Act. This bill addresses an issue which is vitally important to the nearly 260,000 men and women who work for the Department and for the Nation's veterans.

On behalf of the committee, I want to welcome you, Mr. Secretary. It's his first official appearance as Secretary of Veterans Affairs. Now you've been here many times before on testimony as an advocate for veterans. I'm pleased that you are here as our Secretary for Veterans Affairs.

You have many important tasks ahead of you, and your service in the armed forces and many years of leadership with the Disabled American Veterans certainly will serve you well as you set out to accomplish these important tasks. I applaud your recent actions addressing the problem of sexual harassment in the VA.

Increased employee sensitivity and better oversight of complaints processing are needed, but in this day and age this may not be enough to solve the problem in VA or any workplace.

A number of VA employees came before our Subcommittee on Oversight and Investigations last year, and with a great deal of courage they told us about their experiences with sexual harassment. Despite being competent and skilled, several of these employees are still not able to return to work.

Their perception, apparently shared by many other employees, is that the VA doesn't take these complaints seriously. There is a great deal of suspicion and distrust caused by too many years of apparent toleration of unacceptable behavior. The action which you

and the Congress take must clear away that suspicion and distrust and restore confidence.

I hope you have been briefed, and I'm sure you have, Mr. Secretary, on what has happened to the employees who testified before us last year. Their careers were seriously harmed by the behavior of some employees, and I think your intervention could speed up the resolution of their personal cases.

Victims of sexual harassment and other types of illegal discrimination deserve a sympathetic and effective response from their employer. The legislation before us today is absolutely essential to assure employees that mistreatment will be fairly dealt with.

The current system of dealing with complaints is perceived to have conflicts of interest at every step and is viewed by employees with suspicion and distrust. In particular, complaints involving VA supervisors or managers present unavoidable conflicts of interest, and it is these conflicts of interest which this legislation attempts to resolve.

Finally, let me say that we are aware that Government-wide changes in the EEO process are being considered by other committees in the Congress and that changes have been under consideration for a number of years. H.R. 1111 and S. 404 are now pending in the House and Senate.

In most respects, the aim of H.R. 1032 is similar to these bills. If a more comprehensive bill is reported by other committees, I intend to work with them to ensure that the changes proposed in our bill do not conflict with their bill, but this committee should not wait to see whether other committees are going to act on a broader measure.

The victims of sexual harassment deserve relief now, and I want to hear the views of all the witnesses and move this bill forward as quickly as possible.

I wish to extend special recognition to the chairman and former ranking minority member of the Oversight and Investigations Subcommittee, Lane Evans and Mike Bilirakis. They held a very informative hearing last year which revealed most of the deficiencies which this legislation is intended to address.

It was their work and the work of the staff of that subcommittee that led us to this hearing today. I want to congratulate them.

Before recognizing Mr. Stump, I want to mention the other witnesses who will testify. Bette Davis of the Nurses Association of Veterans Affairs (NOVA) will follow Secretary Brown. Bette is President of NOVA, and she does a wonderful job.

Following Bette's testimony, we will hear from Len Gilmer who is Associate National Employment Director for the Disabled American Veterans.

The Veterans of Foreign Wars will be represented by Bob Manhan who is the Assistant Director of National Legislative Service.

Our last witness of the day will be Nancy Kingsbury from the General Accounting Office. Nancy has recently been appointed as Federal Human Resource Management Issues with the General Government Division.

The VVA could not be here today, but a copy of their statement in support of this legislation is included in your folders.



I'd like to recognize Mr. Stump.

Mr. STUMP. Thank you, Mr. Chairman. I'd like to join with you in welcoming Secretary Brown this morning and the panel for our hearing. We look forward to hearing from you.

I don't have anything to say, Mr. Chairman, other than a statement I would like to include in the record. I do support this legislation. I am a co-sponsor of it, and we welcome you here this morning, Secretary Brown. Thank you.

[The statement of Hon. Bob Stump appears on p. 67.]

The CHAIRMAN. Thank you. Mr. Secretary, we are very proud of the fine attendance we have this morning from our committee. We're very proud of that.

The chair recognizes the Secretary of Veterans Affairs.

**STATEMENT OF HON. JESSE BROWN, SECRETARY OF VETERANS AFFAIRS ACCOMPANIED BY RONALD E. COWLES, ACTING ASSISTANT SECRETARY, HUMAN RESOURCES AND ADMINISTRATION; GERALD HINCH, DEPUTY ASSISTANT SECRETARY, EQUAL EMPLOYMENT OPPORTUNITY; ALLINE NORMAN, DIRECTOR, ADMINISTRATIVE SERVICES, VHA; PATRICIA CARRINGTON, SPECIAL ASSISTANT TO THE SECRETARY; DIANA M. BLOSS, DEPUTY ASSISTANT GENERAL COUNSEL; AND STEPHEN A. TRODDEN, INSPECTOR GENERAL**

#### STATEMENT OF HON. JESSE BROWN

Secretary BROWN. Thank you, Mr. Chairman. Mr. Chairman and members of the committee, I appreciate the opportunity to appear here today to focus on what has been a matter of great concern to all of us.

I want to begin by congratulating you, Mr. Chairman, for the leadership you have shown in convening this forum to help us confront the issue of sexual harassment. It is clear that VA has problems in this area and that those problems are serious.

From the outset, there has been no room for doubt, no need for interpretation concerning my personal attitude. Sexual harassment is simply unacceptable behavior, and it will not be tolerated in the Department of Veterans Affairs.

I have taken forceful steps to effect a policy of zero tolerance. The fact is VA's experience in this area is part of a larger picture. Sexual harassment is a societal problem, but we are determined to do what we can to protect the members of our VA family by eliminating this behavior from the workplace. We welcome your support and that of the entire committee in this endeavor.

Measures now under way are described in detail in my full testimony, but I would like to mention some highlights. We are requiring higher level review of all sexual harassment complaints. They will no longer be processed just within an individual facility.

I sent a letter to each and every employee emphasizing that sexual harassment will not be tolerated, and spelled out my expectations that employees will treat each other and those whom we serve with respect. My follow-up letter to employees announced mandatory training of at least 4 hours for every employee on prevention of sexual harassment and the discrimination complaint process. Refresher training will be done every 2 years.

This week we activated a toll free telephone number, the EEO info line, which VA employees, veterans and others can call for information and advice on discrimination and sexual harassment. We will publicize this number throughout our facilities.

I established a work group of senior staff to address sexual harassment and other gender related issues. Also, policy statements have been disseminated, not only forbidding sexual harassment but identifying specific words, gestures and attitudes which may offend or intimidate.

Mr. Chairman, we know that increasing sensitivity and understanding will not take place overnight. Time will be needed for these many actions to take effect. In the meantime, we appreciate advice and information from everyone.

We look forward, for example, to receiving information from the two GAO reviews underway on this problem in hopes that they can help us focus on existing and potential trouble spots. In the same sense, we appreciate the spirit in which your legislation has been placed on the table.

It demonstrates an impressive and sincere effort to help. In fact, we are already doing most of the things this legislation is proposing. We are, however, somewhat concerned about some provisions.

We believe, for example, that all Federal employees should receive equal treatment, regardless of the employing agency. The proposed legislation would result in a process whereby VA and its employees are treated distinctly differently from the rest of government.

Another concern is that the proposal would not eliminate the perception of unfairness, because VA would still be investigating itself. This perception of a fox guarding the henhouse is a problem we are working very hard to overcome.

Mr. Chairman, I want to reiterate my commitment to continue to work with the committee in resolving problems of harassment and discrimination of any nature and, in fact, toward making VA a model organization in eliminating discrimination and sexual harassment.

I am determined to put these problems behind us so we can turn our attention to making even greater progress toward our common goal of repaying the Nation's debt to those who have served.

With respect to the employees who appeared before this agency, I want you to know, Mr. Chairman, that upon reading your letter I was outraged. I am taking this matter under personal advisement, and I have referred each and every one of those allegations to our IG. After a complete and thorough investigation, we will make that information available to the chairman and this committee.

Thank you, Mr. Chairman and members of the committee, for this opportunity to outline our position. I have assembled a team of VA experts who can help respond to your questions, and we will be happy to do so at this time.

[The prepared statement of Secretary Brown appears on p. 95.]

The CHAIRMAN. Thank you very much, Mr. Secretary. We appreciate you getting to the points and giving members the time to ask questions. You might introduce your team at the table there, and tell what they do, what position they hold or let them introduce themselves.

Ms. NORMAN. I'm Genie Norman, Director of Administrative Services, VHA.

The CHAIRMAN. Use the mike, please.

Ms. NORMAN. Do you want me to say it again? I'm Genie Norman, Director of Administrative Services in VHA.

Ms. CARRINGTON. I'm Patricia Carrington, and I'm Special Assistant to the Secretary, and my background is in compensation and pension.

Mr. HINCH. I'm Jerry Hinch, the Deputy Assistant Secretary for the Office of Equal Opportunity in the Department.

Ms. BLOSS. I'm Diana Bloss, Deputy Assistant General Counsel.

Mr. TRODDEN. Steve Trodden, Inspector General.

Mr. COWLES. Ron Cowles, Acting Assistant Secretary for Human Resources and Administration.

The CHAIRMAN. Thank you. Mr. Secretary, I assume by your testimony that you do oppose this legislation.

Secretary BROWN. Yes, sir.

The CHAIRMAN. Actually, all we're trying to do is bring some control over sexual harassment, and our investigating subcommittee came up with some very serious violations that employees of the VA had been sexually harassed and that they were actually afraid of their supervisors, and that—We don't think this bill goes that far. It just maybe sets up administrative law judges, and basically we're just trying to help you, Mr. Secretary.

You keep talking about a big bill that's going to cover all the government agencies. We keep fooling around. We're really not getting anything done, but we're trying to help you, and you've got some problems out there is what I'm saying.

Secretary BROWN. We agree, Mr. Chairman, that we do have problems. We have instituted the toughest guidelines in government at this point in time, and we continue to reevaluate our approach to identifying problems and finding solutions each and every day. I think we are making progress.

The CHAIRMAN. You are addressing some of these problems? What are you doing?

Secretary BROWN. I outlined a number of initiatives that we have taken since we came aboard on January 22. I mentioned to you that we stopped the decentralization process that was in effect, and I would like to ask Ron Cowles to give us a chronology of the various things that we have done since approximately January 26.

Mr. COWLES. Shortly after his arrival, the Secretary met with the Deputy Assistant Secretary of Equal Opportunity to discuss the problems historically in the VA with this important issue. The White House was notified shortly after that of the review of the EEO program, with special attention to the Secretary's interest in sexual harassment and gender discrimination.

Early in February Secretary Brown sent Deputy Secretary Hershel Gober to Atlanta for an on site review of the sexual harassment issues and situation there, which this committee is well aware of.

Shortly after he returned, Secretary Brown issued an all employee letter which declared his zero tolerance policy on sexual harassment, stated his strong personal commitment to prevent and elimi-

nate sexual harassment, and required prompt action and impartial review for sexual harassment allegations.

Very importantly, on February 25, the Secretary suspended the decentralization of discrimination complaint processing and, in fact, restored that responsibility to the Office of Equal Opportunity to assign all investigators and, as important, established a higher level review of all allegations of sexual harassment where, when those allegations are filed, the regional office officials in both the Veterans Health Administration, Veterans Benefits Administration and Central Office officials would be notified concurrently, so that they might track the complaint and help to lead to its early resolution.

On March 9, the Secretary issued some requirements to improve the complaint processing activity and the awareness of employees on the issues of sexual harassment and discrimination. For the first time in VA, he has now required that all employees receive 4 hours sexual harassment and discrimination complaint training and refresher training every 2 years.

New employees must receive this training within 60 days after they start employment with the VA. All counselors, critically important in our program, must now receive training certified by the Office of Equal Opportunity before they can perform any counselor duties. There's also a requirement for the training to be updated with the counselors.

Part-time counselors will now be given term appointments of 2 years and only be recertified if, in fact, they are doing a proper job in providing advice and counsel for employees who feel they are victims of discrimination.

New discrimination and sexual harassment procedures, called for by regulation changes of the EEOC, were distributed to all employees, advising them of the time frames and the requirements and the procedures for filing sexual harassment complaints.

As the Secretary announced this morning, he ordered that an EEO information line be established in Central Office so that employees could call and get advice and assistance on the status of their complaints, on how to file, on who to go to, and how to get assistance for seeking some sort of resolution to their concerns.

He has, in fact, recently activated a work group of field station employees and Central Office employees to focus on sexual harassment and gender issues and to advise him on how these problems can be addressed in VA. That group is going to be meeting the third week in April, and the Secretary and the Deputy Secretary are planning to meet with that group to learn from them what their recommendations would be to improve this process.

Secretary BROWN. One additional thing, Mr. Chairman. I was very, very concerned about the issue of retaliation, and on March 17, I instructed my Deputy Secretary to issue a letter to all Atlanta VA employees telling them, in effect, that we would not tolerate reprisals or threats of reprisals against any employee who testifies or cooperates in the investigatory processes and, should such reprisals occur, they would be dealt with promptly.

We are going to continue that hard line to make sure we create an atmosphere where people are not afraid of coming forward, so

we can identify problems and then work very hard to eliminate them.

The CHAIRMAN. Mr. Stump.

Mr. STUMP. Thank you, Mr. Chairman. Mr. Secretary, we thank you, of course, for your testimony. I have to say that I do agree with the chairman. I just don't think if we have to wait for some massive bill to cover all the problems, that we're never going to get anywhere. We should start addressing these problems.

I understand your opposition to it, from your statement. However, I wish that—or hope that your Department will work with us and try to work out these objectionable parts so that we can come up with a comprehensive bill to deal with the problem.

I just have one question, Mr. Chairman. CBO estimated the cost of H.R. 1032 to be somewhere around \$3 million, and your department comes up with \$14.3 million. That's quite a difference. I wonder if you could elaborate a little on that?

Secretary BROWN. Yes, sir. I would like Jerry Hinch to respond to that, sir.

Mr. HINCH. Yes, sir. We did an analysis and came up with an estimate which identified the present cost of the program today to be almost \$9 million, \$8,900,000. We believe that the cost figures and assumptions made for that cost are pretty solid, sir.

We also then used the same assumptions in working for a figure for the proposed system under the chairman's bill, and we estimate that to be about \$14 million. The major difference between the two, as far as we were concerned, focused in on a couple of areas.

One was that our assumptions included additional costs under the chairman's bill for the EEO counseling expenses and, additionally, the additional cost for hearings when we're utilizing administrative law judges. Also we would assume the necessity of establishing a field structure of about ten field offices.

The CHAIRMAN. Mr. Stump.

Mr. STUMP. Thank you, Mr. Chairman. I think we need to really look into that. It's an astronomical difference. Something has got to be wrong someplace in the assumptions that one side or the other is using. We ought to get together.

Mr. HINCH. We did have a discussion with the representative from the Congressional Budget Office in comparing our numbers with their numbers. Frankly, we came out fairly close on item by item, at least in that telephone conversation we had with them.

We would be happy to share our assumptions with you in detail, sir.

Mr. STUMP. Thank you. We have some additional questions for the record, if you would, on this.

The CHAIRMAN. Mr. Sangmeister.

Mr. SANGMEISTER. Thank you, Mr. Chairman. Mr. Secretary, as I understand it, you have no problem with the way the bill is laid out and the procedures that are involved. However, it seems that you feel that this piece of legislation is now singling out the VA over all other agencies of the Federal Government for a separate procedure which, in effect, makes the VA look like they've got more problems than other agencies in the Federal Government. Am I correctly stating your position?

Secretary BROWN. Well, I accept the words you put in my mouth, with just one reservation. It is not so much that we are concerned that it will make VA look as if it has more problems than any other agency. That's not really our concern.

Our concern boils down to two areas. Number one, we believe there is no justification for singling the VA out and treating VA differently from any other department or agency. That's one basic principal. The second basic principal is, how do you overcome the perception, whether accurate or not, of the fox watching the chicken coop.

We want to overcome that, and that will take an independent agency, separate and distinct from the Department. Those are basically our two concerns, sir.

Mr. SANGMEISTER. You also feel that until some overall bill is passed through this Congress to cover all situations that occur within the VA, you can handle this very nicely the way it is now. Are you indicating to us that you have procedures underway to take care of the present cases that have arisen?

Secretary BROWN. Yes, sir. We are working very hard on two fronts. First, we want to deal with the problems that have already been identified. Secondly, we want to create an atmosphere so that employees subjected to this kind of unacceptable behavior can feel free to come forward. That way, we can find out what the problems are, deal with them, and eliminate them.

So those are the two areas we will be focusing our attention on in coming months and years.

The CHAIRMAN. Thank you very much. Mr. Hutchinson of Arkansas.

Mr. HUTCHINSON. Thank you, Mr. Chairman. Mr. Secretary, first of all, I want to thank you also for appearing today and for your very strong statement on the unacceptability of sexual harassment in the VA workplace, your recognition of those problems that the Department has had, and your commitment to resolve them. I appreciate all of those things.

Now one of your objections to the bill that you've referred to on a couple of times is that you don't think this legislation would remove the appearance of unfairness or the fox watching the chicken house; but would it not, to the extent that these EEO counselors are independent from the local managers, at least to that extent, improve that current appearance that there is an unfairness in the system?

Secretary BROWN. We can do that within the present framework. We could accomplish just what you are talking about, but in the long run, it may not be best. Even though we are an extremely large agency—we have close to 260,000 employees, let's just take our hospitals. There are only 171 hospitals out there.

There are close relationships and bonds that take place at different levels, at the hospital director level, at the assistant director level. Each has different kinds of associations and no matter how you cut it, people are going to believe, especially if things do not work out in their best interest, that this was a kangaroo court, a set up. They will believe they were not treated fairly because of relationships that have already been formed that tend to protect each other.

In the much larger picture, the only way to overcome that is to have a separate and independent entity to adjudicate those cases, investigate and adjudicate those cases.

Mr. HUTCHINSON. All right. I appreciate your answer. I'm kind of torn, Mr. Chairman. I think it is essential that a clear message be sent that the VA is not going to tolerate sexual harassment, and this bill would send that kind of message. I share your concern, but not particularly about the costs because the costs, regardless of whose figures you accept, are going to be relatively small.

My concern is that anytime you start a new office, the tendency of government will be for it to grow over time and to become more bureaucratic, involve more employees, and we see it at a time of tremendous fiscal problems, particularly for the Veterans Department which has been hit so severely in the past.

I'm concerned that in the future we may see a new agency grow and contribute to our fiscal problems, and I'd like you to comment on what your feeling on it is.

Secretary BROWN. You summarized it very nicely. Like a living organism, a new organization has a tendency to grow and expand. I think a lot of the things that H.R. 1032 wants to accomplish can be done internally and for a fraction of the cost. If it doesn't work, then we should look at the much larger picture, because the VA is not the only one having problems in this area.

Whether you're in the private sector or the public sector, at any work site, you're going to find the same kind of problems. So the test will be exactly how we deal with it. If we deal with it independently and fairly, we'll be way ahead of the game as opposed to creating and strengthening internal processes that we already have in place.

Mr. HUTCHINSON. Thank you, Mr. Secretary. Thank you, Mr. Chairman.

The CHAIRMAN. Before recognizing Mr. Filner, Mr. Secretary, I don't think your argument is very strong where you say that this would be discriminating against employees of the VA if we would pass this bill, other than other departments of government.

You have a unique department. You have the largest hospital care system in the country, and you have the largest number of employees other than the military. So I would think that you are unique and that I would hope that this legislation would help you in some of your problems.

The chair would like to recognize the gentleman from California, Bob Filner.

Mr. FILNER. Thank you, Mr. Chairman. Good morning, Mr. Secretary. It's a pleasure to get to know you and the work you are doing. I was just struck by the chairman's opening statement that this doesn't seem to be an unreasonable kind of approach, and if it made you different, if it were better, so you become the model for other agencies.

The difference argument doesn't strike me as powerful, if you were doing the right thing. As I understand it, although I'm new here, there are folks in your agency—I think Mr. Hinch is one—who recommended in the past changes very similar to what are in this bill.

So I'm just wondering why there is a big deal about it in terms of what looks like very reasonable kinds of requirements.

Secretary BROWN. Well, I can't speak to what information Mr. Hinch has provided you. I can only speak for the Department as the Secretary of Veterans Affairs, and we have some concerns about this bill.

Mr. HUTCHINSON. Thank you.

The CHAIRMAN. Thank you. Mr. Everett of Alabama.

Mr. EVERETT. Thank you, Mr. Chairman. Mr. Secretary, thank you for appearing today. Would you help clear up a couple of things for me. First of all, I have a little problem knowing the specifics of how you would do away with this idea of the fox guarding the henhouse. I didn't quite understand how you would do away with that perception.

Secondly, am I to understand that you can absorb this mission within your current VA structure at no additional cost, while there would be additional costs if another agency handles it?

Secretary BROWN. If another agency handled it, it would reduce our costs, but that's not really the primary thrust here, even though that was included in my detailed statement.

In my statement I only talked about two issues. One is why should VA, out of all of the other departments and agencies in this town, be singled out and treated differently. That's one point I stressed.

The other point I stressed has to do with perceived fairness. At best it's going to be perceived with suspicion when the decision maker has a relationship with the people who are causing the problems.

You raise another question: How to deal with this within the present framework? I can't eliminate it, but I don't see where we would be further ahead by adopting this particular approach, because the perception is still there.

I ask that we be given a chance under current procedures to see if we can strengthen this system enough to make a difference. That's the only point I'm making, sir.

Mr. EVERETT. Thank you, Mr. Secretary. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Everett. Mr. Gutierrez.

Mr. GUTIERREZ. Thank you, Mr. Chairman, and welcome, Mr. Secretary.

Secretary BROWN. Thank you, sir.

#### OPENING STATEMENT OF HON. LUIS V. GUTIERREZ

Mr. GUTIERREZ. A special welcome from Chicago. I've heard a lot of discussions about costs, Mr. Secretary. Yes it does cost money to develop a program that will ensure employees' complaints receive the attention that they deserve. On the other hand, I believe that, if nothing is done, it is far more costly, because the VA will be forced to replace experienced, knowledgeable employees who leave the Department because their complaints go unresolved.

A recent survey indicates that it costs up to \$6.7 million for the average Fortune 500 company when sexual harassment complaints



go unresolved due to employee absenteeism and lack of work that occurs; but when measuring costs, let's not stop there.

Always remember that the ultimate cost is the impact that such problems bring to bear on the quality of work that veterans receive. If any cost comes close to that, it's the price we pay when an American feels that he or she counts less than anyone else. And that certainly is not the kind of America I know that you and our veterans fought so heroically to defend.

I'm very concerned about the level of confidence that VA employees feel about the system. I'm very concerned about mixed signals. I know that you have established several programs that increase awareness of the issue of discrimination and harassment and you have zero tolerance for any discrimination. Yet the VA is telling us today to wait on this legislation.

I think we have a piece of legislation in H.R. 1032 that fills a need, a bill that gives the VA the opportunity to work in concert with Congress and to be at the forefront, Mr. Secretary, of the Federal Government's effort to address this very issue.

Instead, we're told on the Veterans Committee, Democrats and Republicans alike—We're told to wait until Government-wide reforms are developed. I'm less worried about what you're telling members of Congress this morning than the message we might be sending—through our action or inaction—to the members of the VA community.

Mr. Secretary, please tell me about the level of confidence that employees have expressed to you and to your staff about the current system and the changes that you have implemented and how the VA's request for delay on Congressional action affects their outlook short and long term.

Secretary BROWN. I have not received any information that deals with the reaction to this legislation and its impact on the confidence level of our employees. This is fairly new.

With respect to costs, as I already mentioned, that is not a primary concern. I agree with everything you've said with respect to that.

We can accomplish most of the intent in H.R. 1032 administratively, for about \$3 million, with approximately thirty new FTEE. Twenty-five of those would be investigators, and approximately five will have oversight supervisory roles at VA Central Office. The twenty-five would be spread out in the regions throughout the country.

This could go a long way toward resolving these problems. As I've said before, I only have two principal concerns, and one has to do with a perception of fairness. Two is how do you justify treating VA differently from other agencies, especially since we know that we have the same type of problems.

We are going to do everything we can to try to fix the system to restore confidence. I feel just as you feel, that people have a right to expect that when they come to work they will be treated with respect.

We spend more time with our associates than we do with our families. As a result, we have a legal and a moral obligation to create an environment that will foster greater productivity and a more enthusiastic workforce.

Mr. GUTIERREZ. Mr. Secretary, very quickly, you have expressed the concern that VA employees would be treated differently because of H.R. 1032. Can you tell me how you feel employees will be treated differently and what differences in treatment concern you, and whether the VA employees, you feel, will be treated better or worse, in your opinion, because of H.R. 1032?

Secretary BROWN. I'm thinking the big picture here. If all other agencies have their sexual harassment complaints adjudicated by an independent entity, why should VA be granted an exception from that process? I don't see any justification for that, especially once you factor in the issue that I raise, the one of fairness or at least perceived fairness.

By having an independent body adjudicate those complaints, I think, we would be way ahead of the game. Mr. Cowles has a couple of observations.

Mr. COWLES. I would just like to add something that the Secretary will soon be aware of when we talk about employee reaction. Alma Lee, the President of the VA Council of Locals for the American Federation of Government Employees, and I've received a carbon copy of this letter, recently written to the Secretary.

This is a union which represents 120,000 of our 260,000 employees, and she has applauded the employee letters that he has sent out and his strong commitment to employee training and awareness, and to having counselors better trained including the recertification process.

She believes that his position is one that is long overdue and is going to be received very well in the field by employees and supervisors and managers. She also goes on and adds that she hopes he takes the same kind of interest in other labor relations issues, but this particular issue is one which is incredibly important to employees, and she applauds his efforts.

The other reaction we've had: We recently had discussions with our Personnel Officer Advisory Council. These are personnel officers from around the country. They say the reaction to the Secretary's position on sexual harassment and training has been overwhelmingly received in a very positive manner, and the personnel officers are very anxious to begin to supplement and add to the training that they have already conducted and now want to do more of.

So I must say, the early reactions have all been very positive.

The CHAIRMAN. The Congressman's time has expired. Let me clear up something here. In my opening statement I said, Mr. Secretary, if we get a larger bill or other bills that have been introduced in the Senate and the House on sexual harassment that would cover all government employees, that we would certainly take our bill and work with those others that might bring their bills forward.

This bill, if passed, will be referred to other committees on the Hill here, but if we just have to wait around on something happening here, and you've got one of the largest agencies and you've got the biggest problem right now, it seems, on sexual harassment, that you ought to let us move ahead with this bill.

Jim Clyburn of South Carolina.

### OPENING STATEMENT OF HON. JAMES E. CLYBURN

Mr. CLYBURN. Thank you, Mr. Chairman. Mr. Secretary, it's a pleasure to have you here this morning. I suspect that most people here are a bit familiar with my background. I spent 18 years as the principal EEO officer, affirmative action officer for the entire State of South Carolina, and I learned in those 18 years that the two things that are most important in all of these matters are, in fact, perception and trust.

I don't care what you try to do, how many procedures you put in, how many training sessions you have, if your employees do not perceive the process or whatever you've done to be an adequate response to their past problems, there is going to be absolutely no trust in the process at all.

So I applaud Chairman Montgomery and the members of this committee for making an attempt to establish an element of trust in this process, and I think that this bill is an appropriate response to the past allegations.

Now I don't know what may have happened before this committee, but I do know what I read about Atlanta and the concerns I had watching television and reading about these matters. I think that we ought to be responding.

Let me ask you a question about this process. I go back to the question about the fox again guarding the henhouse. It seems to me that this bill is a much better response, because it puts independence in the process. It removes your current employees from the process.

As I understand what you've done, you're saying that people can select their own EEO counselor and that kind of stuff, but they will select them from current employees. Am I correct?

Secretary BROWN. Yes.

Mr. CLYBURN. Do you believe that's a trustworthy response, a much better area than having independent adjudicators?

Secretary BROWN. We can do what the bill proposes to do administratively, if we want to focus on that, but I look at it in a much larger context. That context has to do with what you mentioned, trust.

It's going to be very difficult, in my judgment, to create trust and confidence in a system where the employees who investigate and adjudicate those cases come from within the system. You're always going to have the perception that it was not done totally fairly.

If we are going to make institutional changes, we'll be way ahead of the game by creating an independent entity totally separate and distinct from the Veterans' Administration.

Mr. CLYBURN. But don't we already have that, Mr. Chairman, in the Federal division—I forgot exactly what we've called it—that's set up under the Equal Employment Opportunity Commission? We have that. It's in place. It's been there for years, but what we're trying to do now is resolve these issues short of that; because if we bump everything in the Federal Government up to that agency, it will be so bogged down they would never get anything done.

So what we're trying to do now is to stop some of these things before they ever get to that point, but the appeal process, as I understand this legislation, will still be there for employees who are

not satisfied at your level. They can go to court and, even if they were to rule in favor of, it would still have review by that division of the United States Equal Employment Opportunity Commission.

So the independent process is there. What we're trying to do is resolve these things short of that.

Secretary BROWN. I agree with you. That's the area we are concentrating on. I think we should stretch or expand that independent process by having someone else take a look at it and make those decisions.

Mr. CLYBURN. Well, I don't think that I have a problem with what you're attempting to do. I just think that this bill—Believe me, I think that you would appreciate having this legislation if your experiences are anything like mine were.

That's all I have, Mr. Chairman.

Mr. EVANS (presiding). The gentleman from Kentucky, Mr. Baesler.

Mr. BAESLER. I have nothing.

Mr. EVANS. The gentleman from Georgia, Mr. Bishop.

Mr. BISHOP. Thank very much, Mr. Chairman. Let me also say that I'm delighted to have the opportunity to share this morning with the chairman and his fine staff. As one of the co-sponsors of this legislation, however, I must say to the chairman that I'm a little puzzled as to why the official position of the Department would be in opposition to this legislation.

It seems to me, and correct me if I'm wrong and perhaps your counsel can advise me, what this legislation does is to do for the VA what the Department of Defense already does for its civilian employees. Is that not true? Isn't this basically the same procedure that the Department of Defense uses for its civilian employee complaints of employment discrimination?

Mr. HINCH. There are similarities, sir, between what this bill is setting up as well as what goes on in DOD. The Secretary has suggested that, short of the legislation, there are administrative steps that he can consider that will move us in that same direction as the legislation is trying to take us, which would replicate what you're suggesting is over in the Department of Defense.

Mr. BISHOP. Well, that then means that it wasn't an accurate statement to suggest that this would set the VA apart and make it the only agency where these kinds of procedures would be applicable, when we already have had and have had for a number of years these almost identical procedures operating successfully with the Department of Defense. Is that not the case? That was a little inaccurate then, wasn't it?

Mr. HINCH. Well, the system in the Department of Defense was established administratively, and I think what I've heard the chairman—the Secretary suggesting this morning is we can accomplish many of the objectives of the legislation in a similar fashion as DOD, if you will.

Mr. BISHOP. But you haven't moved to do that at this point, have you?

Secretary BROWN. Actually, yes, we are working on that. We have identified areas in which we could strengthen the process administratively. We've identified costs. As I mentioned, it's going to cost us about \$3 million and require an additional 30 FTEE.

Let me just say this, Mr. Bishop, and you may find that I'm somewhat retrenching, but I'm not really. I want to just clear this up. I don't oppose this bill; I don't support it. I understand the thrust, the approach you are trying to take and the spirit you are trying to capture.

I think all of that can be done administratively. You are not going to find the VA out trying to just outright have this legislation defeated. I'm just saying that, on the other hand, you're not going to find us out there beating the bushes trying to support it, because we think that it really falls short of what it will take in order to bring about meaningful reform, not only within the Veterans' Administration but also in our society at large.

Mr. BISHOP. Let me follow up, Mr. Secretary, and perhaps Ms. Bloss may be interested in responding to this. Currently, could you just very briefly indicate what the options that now exist are for an employee that would find him or herself the victim of some form of employment discrimination, not just sexual discrimination but any of the prohibited acts under any of the discrimination statutes that are now applicable, and how those options would be changed, enhanced or decreased by virtue of this legislation?

Ms. BLOSS. Under the current procedures, the first step is with an EEO counselor at the station and under the direction of the management there.

Mr. BISHOP. Let me interrupt you. I guess what I'm asking is you have an administrative, but the employee can also go directly to EEOC, can't they?

Ms. BLOSS. Yes.

Mr. BISHOP. So you have an administrative procedure—

Ms. BLOSS. Administratively is counseling with informal adjustment, then to an investigation where again there is an opportunity to informally adjust it, then to a decision that's done by our office. There's a final agency decision that can then be appealed to EEOC.

Prior to a decision, the employee might have asked for a hearing on the case. That hearing would be held before an administrative judge from the EEOC with a recommended decision that would then become a final decision out of our office and with appeal rights to EEOC, and then on to a de novo review in the district court.

Mr. BISHOP. The employee can also elect to go directly to EEOC and go directly to court with a request for right to sue, can't they? Is that not true?

Ms. BLOSS. Yes, in some cases, or with 180 days—If 180 days have passed, they can go directly to court.

Mr. BISHOP. Right. So virtually what we are doing here is adding another option for that employee so that you've got an administrative law judge as a possibility, which would save the agency having to pay attorney's fees, for example, or having to pay damages which would result from a law suit if the employee went directly to court.

Ms. BLOSS. I wouldn't think there would be that difference. The difference that we see in the bill is that, instead of having the hearing before an administrative judge and a recommended decision by that body, it would be a formal binding decision by an ad-

ministrative law judge. That decision then could still be appealed to EEOC and into the court.

If the employee prevailed, there would still be the rights of attorneys' fees and damages.

Mr. BISHOP. Under this bill?

Ms. BLOSS. Yes.

Mr. BISHOP. Thank you, Mr. Chairman.

Mr. EVANS. Mr. Linder, the gentleman from Georgia.

Mr. LINDER. Thank you, Mr. Chairman. Mr. Secretary, welcome. You asked how we could justify this on your agency. Your agency happens to be one that this committee has purview over, and I think if this chairman had purview over another agency and it had the same problems, he would probably be introducing this legislation for them, too.

In response to Mr. Clyburn's question, you said you preferred to select your EEO officers from current employees rather than have a special EEO officer assigned. Isn't that just what the problem was in Atlanta?

Secretary BROWN. Yes, that was the problem, exactly the problem.

Mr. LINDER. That the people being harassed had to actually go to their supervisors and, in some cases, one of the harassers was a supervisor?

Secretary BROWN. The EEO officer was one of the harassers. Atlanta is a microcosm of the big problem where you have people who are part of the problem making decisions. In this case, there was enough evidence to demonstrate that, and we were able to point to individuals. But in most instances they protect each other, and you are not able to put your finger on it.

It is something you know that is out there. It doesn't make people feel good about the decisions that come out of the process, especially since they can't say, well, you did this wrong or you did that wrong. It's a matter of perception that this good old boy network is what caused me to be in the problem—in the position that I am in today.

Mr. LINDER. Isn't that precisely what the chairman is trying to change with this legislation?

Secretary BROWN. Yes. Yes. Absolutely correct, and I don't think I've said anything to the contrary.

Mr. HINCH. Could I add to that, Mr. Linder? Yesterday the Secretary approved, to try to work on this problem, that our office now will have oversight and approval of all counselors. That was not the case in the past.

Specifically with Atlanta, what we found was that, when we talked to them, we heard the right words, which weren't the same as their actions down there. We now also have set up time frames, two year term appointments for counselors, and they would have to be renewed by my office.

We have had enough information over a period of years to have strongly suspected there was a problem there, but every time we talked to the director, others associated there, we were just simply misled.

Mr. LINDER. If Atlanta is as the Secretary says, a microcosm of the whole hospital system, what have you done to assure that the

other 170 hospitals don't have a good old boy network doing the same thing?

Secretary BROWN. I didn't mean that. I'm talking about society at large, or within any structure. If you go to the VA or you go to Department of Defense or you go to just a small agency, you're going to have the same kind of problem there. It's one of perception, and in the absence of some kind of mechanism where people have confidence in the process, they're going to distrust it and, I think, rightly so.

We are trying to do internally what this bill hopes to do. For instance, one of the things we are looking at right now is that counselors must be certified. We are going to call and talk to that individual to make sure he or she wants to serve. In a lot of instances, people may say, hey, I don't want to get involved in this; if I come out with a decision against this fellow, it may adversely impact on my employment, so I just don't need this.

Then you have the other side of the coin where the hospital director or the regional office director says that you will. So you put them in kind of a Catch 22 situation. What we want to do is change that process so people will understand a couple of things, that it is in their best interest that they do serve, and it is in their best interest that they identify these problems so they will improve the working conditions not only at their facilities but at all facilities. Take, for instance, in Atlanta; we learned from that process. A lot of the changes we are making now came out of our thorough review and analysis of what went on there.

Mr. LINDER. One more question, Mr. Chairman. How recently have you been back to the VA facility in Atlanta, and how confident are you that you've cleared up the problem there?

Secretary BROWN. I sent my Deputy there in January, but we are still investigating that problem. Other information is coming forward, and that's what we are talking about. We thought it had been resolved, because people were no longer coming forward, until we started sending out our letters. We sent out an all-station letter, a letter to all 260,000 employees, and a letter specific to Atlanta employees that said that anyone coming forward will not be taken advantage of.

All of a sudden, new evidence is coming forward that may put a different light on that situation. That's the kind of climate we are trying to create within our own structure. We think that can be accomplished.

I understand exactly the force that this legislation wished to capture, and I support it. My only point is, we can do most of this internally, and if legislation is needed, quite frankly, I would like to see an independent agency set up to adjudicate these cases and take that good old boy network completely out of the process.

Mr. HINCH. Mr. Linder, also the Secretary has approved establishing an evaluation unit in my office, something we did not have before. What that led to was we looked at the paper and we looked at the numbers, but we really didn't have the ability to really go on site and talk to people and interview people, much like the IG does.

Even though we would get anonymous phone calls and letters and so forth that there was something wrong, we had to talk to the

people and rely on the people at Atlanta and the hierarchy down there and their letters.

Mr. LINDER. Thank you. Thank you, Mr. Chairman.

Mr. EVANS. The gentleman from Massachusetts, Mr. Kennedy.

#### OPENING STATEMENT OF HON. JOSEPH P. KENNEDY II

Mr. KENNEDY. Thank you, Mr. Chairman. Well, first of all, I want to welcome you, Secretary Brown. It's good to see you and your team up here today, and I also want to congratulate you on—I think, just by virtue of the fact that you have come forward with a plan, will, I hope, give employees within the VA a sense that there is a different attitude by at least the national office with regard to the issue of sexual harassment.

I think that why you are sensing some concerns on behalf of the committee is that there is a real recognition that this is an issue that scares people. It's an issue that scares employees from coming forward. The testimony that this committee received last year indicated that a great many of your thousands and thousands of employees are just absolutely petrified of coming forward.

They don't believe that the system, even if they do come forward, will in fact offer them protections, and therefore, they will be sent back into the same syndrome of harassment without any hope and, further, perhaps could even suffer in terms of their own career advancement as a result of having to continue to work, having filed against perhaps a boss or a boss's boss.

I think that, while we want to compliment your efforts, there are still concerns that we have in terms of whether or not the reforms that you have advanced really get to the root causes of the problem. Specifically, I have concerns that in fact under your plan the EEO counselors are still going to be internally appointed by the medical director and often have other full time responsibilities.

So that this does not become the central focus of these individual counselors' activities, but rather a secondary activity. Further, I think that there are concerns that housing this within the General Counsel's office, which is, after all, an organization that, in most cases, tries to protect the VA, does not in fact accomplish the sort of ombudsman's mentality that is necessary to create the kind of atmosphere that people feel centrally deals with the issue of the fox guarding the henhouse.

So I guess what I'm trying to drive at is that the concern is that we really haven't gotten to the root and that your answers thus far are indicative of a situation that we want to see the, of course, sexual harassment eliminated. I don't think that that's a realistic goal.

So if we're not going to eliminate the problem in the VA or probably in any other agency or any other office of this country, then what we really have to do is set up a situation where, when it occurs, we can get to solving the problem.

I'm concerned that in pursuit of the primary objective of elimination, we have lost sight of the perhaps more important objective of allowing a good, clean process, independent of the existing situation, to be developed.



I think the point of H.R. 1032 was to try to get that independence that I am concerned is not included in your current plan.

Secretary BROWN. Well, Mr. Kennedy, let me say that I agree with your overall efforts. I don't take issue with that. We are just as concerned as you and members of this committee are about the issue of sexual harassment. It is devastating and very traumatizing, not only to the victim but also to the perpetrator.

Mr. KENNEDY. Run that one by me again. It's devastating to the perpetrator?

Secretary BROWN. Yes. In many instances, a lot of these people are married. They have families and, once they get involved—

Mr. KENNEDY. Well, I'm not going to feel too sorry for the perpetrators of sexual harassment. I don't think that's what we're trying to do, Mr. Secretary.

Secretary BROWN. I'm talking about trying to create a situation where we do not allow it to deteriorate to the point where we have families broken up because of this abnormal behavior.

Mr. KENNEDY. Well, Mr. Secretary, I think this does deal with the root cause. I don't think we can be concerned about—To be honest with you, you know, if somebody is going to get out of line in terms of their sexual behavior, I don't think that it's your job to protect that individual's family. I think your job is to protect your employees.

I think that, if you begin to start to feel that your job is to also, protect that individual's family in addition to the employees, we have really lost sight of what the purpose of your efforts ought to be.

Secretary BROWN. Well, protection is your word. I did not say that the whole effort was to protect them. What I was saying is that it's traumatizing at both ends, to everyone involved. That's one point I want to make, but let me move on. I want to address a couple of other things.

With respect to the counselors selected by facility directors, I think it is important to mention that 70 percent of the cases or the allegations or complaints are favorably resolved at that level. So—

Mr. KENNEDY. But wait a second, Mr. Secretary. Don't tell me that what you've got here is 70 percent are being favorably resolved. The fact is what we're talking about is that people don't come forward. So, you know, the fact that you've resolved them favorably in 70 percent of the cases of the 101 that do come forward doesn't deal with the effective testimony that this committee heard last year about the pent up number of cases that don't come forward, because they are concerned that their cases will not be in fact resolved favorably.

Again, I guess I'm kind of taken aback by your attitude in terms of your notions of zero tolerance. I don't think you're going to get to zero tolerance if you create an atmosphere where people are going to think that you're as concerned about the impact on the perpetrator of the crime as you are on the victim of the crime. I think that you send a very strange message right at the moment, Mr. Secretary.

Secretary BROWN. No, that's your message, Mr. Kennedy.

Mr. KENNEDY. No, it wasn't. It was your message, Mr. Secretary—

Secretary BROWN. Oh, yes. It is your message.

Mr. KENNEDY (continuing). I repeated what you had to say.

Secretary BROWN. I did not say anything about protecting the perpetrator. I didn't say that. What I was saying is that the people that are involved are often traumatized. They are devastated.

You take, for instance, one of the individuals that was involved in the Atlanta situation. He was married. He also happened to have lost both legs and an arm in Vietnam. When this whole thing happened, that had devastating consequences on his life and the life of his family. That's the only point I was making. I didn't tell you or this committee that I had an obligation to protect his interests.

I just made just an observation. I want to move on from there, sir, to respond to some of the questions you raised. You talked about the EEO counselors. I simply want to say that at that level we are approximately 70 percent successful in the kind of counseling we provide. We are taking action to strengthen that process by having certification by Central Office.

When they make recommendations, we are going to be in direct contact to make sure they want to serve. We want to take full-time independent investigators, not associated with the facility in any way whatsoever, and have them go from one location to the next, dealing with these various issues.

I don't think we are saying anything that's too different. The only point I want to make is that we can do administratively some of the things you hope to achieve in your bill. That's the only point.

We're not going to argue with you about whether or not sexual harassment is a terrible thing, because we agree with you. We want to do everything we can to eliminate it, and we are working very hard toward that effort. That's the only point, sir, I wanted to make.

Mr. KENNEDY. Well, I guess just to follow up in response, I mean, I have—As I have said, I think that it is important that you get the independent, full time employees that have this capability. That is what H.R. 1032 accomplishes, and I don't believe—My understanding is that that is what the changes that you have proposed in fact do accomplish. I'm just concerned about that, Mr. Secretary.

In response to your description of the particular gentleman that you referred to who had lost his legs in great service to his country, I feel, obviously, this is an individual that has tremendous heroism, and we should respect his heroism; but I think that if he's asked twenty separate women to hold his sperm samples that that ought to be taken into account, and we can't take into account with regard to that specific action other aspects of his career.

I think you have to, in fact, deal with the sexual harassment issue independently of the other benefits that he has given to this country and to this society.

Secretary BROWN. And I agree with you, and we did just that in that particular case.

Mr. KENNEDY. Yes, sir.

Secretary BROWN. All I wanted to say is that this issue is just devastating on both sides, and that's the only point. It carries a human toll, a massive human toll, and what we need to do is to go about the business of trying to sensitize people that this kind of unacceptable behavior is not good for the people that it's perpetrated against nor is it good for the people that are involved. That's the only point, sir, that I wanted to raise.

Mr. KENNEDY. Thank you.

Mr. HINCH. Mr. Kennedy, that individual you were talking about in Atlanta was not a counselor. He was an EEO coordinator, and the Secretary has prohibited establishing those kinds of positions any longer.

What they were using that person for was, they said, to even out the work flow among the counselors. In fact, what that person is alleged to have been doing was discouraging and getting rid of complainants who came into the system.

We have now prohibited the stations from establishing EEO coordinators out there, and we have also—the Secretary has also issued a statement very clearly saying that people have the right to any EEO counselor that they choose, and there are no coordinators there to prevent them from having that access any longer.

Mr. KENNEDY. As I say, the fact is that this EEO counselor has a full time job as is. Correct? So you've got—I mean, I still think that there H.R. 1032 gives a great—a much higher priority to this issue than the system that has been proposed.

I think that the system that you have proposed is a vast improvement on the current system, and I think you are to be commended for that attempt. I think that what the committee is suggesting is that H.R. 1032 takes it another step. We realize that, and there are many of us that are concerned that we really have to take that further step.

Anyway, thank you very much, Mr. Secretary, for coming forward.

Secretary BROWN. Thank you, sir.

Mr. EVANS. The gentleman from New Jersey, Mr. Smith.

#### OPENING STATEMENT OF HON. CHRISTOPHER H. SMITH

Mr. SMITH. Thank you very much, Mr. Chairman. I'd like to begin by associating my remarks with the gentleman from Massachusetts, Mr. Kennedy, who I think made a number of very, very valid points. You know, a victim is a victim, and the perpetrator is not a victim unless that person is indeed not a perpetrator of a crime but is a falsely accused person.

I think to blur that line of demarcation is very, very dangerous. Yes, we have concerns for their family and the impact it might have on that person, but if somebody is going around and doing these kinds of things to women, I think they need to be held very strictly accountable, and I think you would agree. Mr. Kennedy, I think, was getting at that very point.

I'm very disappointed that the VA has opted to oppose H.R. 1032. The argument that the VA doesn't want to endorse a process that treats the VA differently than other employees is, in my view, at best weak and very unpersuasive, particularly in light of Mr. Bish-

op's remarks and your response to it regarding DOD and, beyond that—having a process itself. But leadership, it seems to me, means that if a problem is identified, even if we can't fix it massively Government-wide, which we all hope to do in time, if one agency can take the lead, I think it ought to be encouraged to do so. This committee and the co-sponsors of this important legislation are trying to show and demonstrate some leadership.

I did note in your testimony, Mr. Brown, that you seem to suggest that the ALJs who would be vested with that power to finally render an opinion somehow cannot be considered to be independent. I would hope that's not the case, and I think we need to very clearly differentiate between perception, which may not be all that important provided the reality is a certain way, indeed, that they are independent in doing the job honorably and based on the merits of a given case.

I hope that's not what you're saying, because I think that could perhaps be demoralizing to an administrative law judge in general. I do have a concern, and I seem to be the only one to have it, because it has not been raised as we get through this question, with the metaphor of the fox in the henhouse.

I'm not trying to nitpick here, but I think there are at least some women who will take offense to being collectively thought of as being hens. You know, that is a problem with me, and I think some would bristle at it and take offense at that metaphor.

We had a situation at the Lyon's Hospital, as I know you are very well aware of, which brought this issue very much home to me. Although I do not represent the district within which Lyons is situated, it is close enough to me, and many of my veterans utilize that hospital and see the people that have been involved.

The case is absolutely compelling. As you know, Donna Grabarczyk—it's a Polish name and very difficult to pronounce—and Mary Cavanaugh, who was a collaborating witness, both came forward. Donna had the problem of repeated harassment by the Chief of Physical Services, a man by the name of C.W. Lewis.

She originally was not going to come forward, did so, and then it was found that about twelve of twenty-two people either observed harassment and testified on such or were harassed themselves, but many of them absolutely feared to come forward out of a concern for retaliation. They would be demoted. They would be harassed. They would perhaps get poor work ratings by their superiors and, as Mary Cavanaugh pointed out as she testified before Mr. Evans' committee, as did Donna, that it was a pattern of abuse.

Yet this particular individual, as Donna pointed out in her testimony, which I would ask, Mr. Chairman, be made a part of this record as well because I think it bears repeating. The testimonies of the two individuals, one who was harassed and one who experienced or observed it, as they testified before your committee, should be made a part of this hearing.

Mr. EVANS. Without objection, so ordered.

[The statements of Ms. Cavanaugh and Ms. Grabarczyk appear on pp. 70 and 77.]

Mr. SMITH. The information is so overwhelming, and yet this individual retained his position and is now retired on disability. If that doesn't send a message that, you know, this is just okay. I

know you're trying to correct it. I do applaud you, as others have said on this committee, for trying to take a proactive stance, but this bill at least tries to up the ante and to be more serious about the issue, even if it is not being replicated by your sister agencies within the Federal Government.

It just seems to me that there is nothing wrong with leadership. This committee has a bipartisan approach, Democrats and Republicans who are equally committed to this, and I would hope that the VA would reconsider its opposition. It seemed as if you were almost taking a personal neutrality, Mr. Secretary, on your part; and if you could also speak to the issue of the corroborating person, the person who sees—witnesses it and then is fearful of coming forward, and then actions are taken, retaliations are taken against that person, as in the case of Mary Cavanaugh.

Secretary BROWN. Because of the Privacy Act, I'm unable to deal with specifics on that individual case. Let me just say this, I think it is important that a complaint was filed against him. It was pursued, and he was indicted.

It is not as if you have a system that is totally insensitive and nonresponsive to the complaints.

Mr. SMITH. If the gentleman could yield for one brief second, then I will yield right back. The problem was that throughout the process there were hindrances at various levels, particularly at the hospital. There was a sense of this is going to get down and dirty if you proceed with this, hinting, more than hinting, threatening that anyone who collaborates in this would find themselves on the wrong end of the stick, if you will. Even if you couldn't prove it, they would be hurt, and that's part of the problem. I yield back.

Secretary BROWN. I agree with you. But I use that as an example of why we probably need a system that is totally independent, separate and independent from the Veterans' Administration, so we will not have to deal with those kinds of problems.

Mr. SMITH. Over and above the administrative law judge—is that not sufficient to—

Secretary BROWN. I don't care if you call him an administrative law judge or you call him anything you want to. If he is an employee of the Veterans' Administration, you are going to end up with a perceived question of trust with respect to the decisions that are promulgated by that individual.

If you want an impartial body, and you're going to the trouble of changing the law, then you probably should create a system that is totally separate and apart. That's my only point.

Mr. SMITH. What is your recommendation?

Secretary BROWN. I like a lot of the features in H.R. 1032, and I think we can probably do most of them administratively, with very little cost. We've identified a cost of approximately \$3 million which would allow us to hire twenty-five investigators and about five oversight supervisors involved in the process to be able to do most of the things contained in this bill. I think we deserve a chance to do that.

If it doesn't work, I think that we should look at the big picture. Remove VA from the adjudicative process altogether. If someone is discriminated against or sexually harassed, let an independent body take a look, and make the final judgment.

That way, you don't have this perception that all these people know each other, have worked with each other for years and years and years, and been transferred from one station to the next. You don't have all of that. It's a totally separate agency that's doing the investigation and development and ultimately the decisionmaking.

Mr. SMITH. Thank you very much, Mr. Chairman. I know I'm out of time.

Mr. EVANS. Thank you. The gentleman from New York, Mr. Quinn.

Mr. QUINN. Thank you, Mr. Chairman. Welcome, I think, Mr. Secretary. Everybody else has done that. So I'll join and welcome you and your staff up here this morning. Just a couple of questions that I need some information on.

Earlier in your testimony, you and a couple of members of your team mentioned this 800 number. Tell me a little bit about that. It's in place now? Who does the employee talk to when they call that number? What kind of information do they receive?

Secretary BROWN. It's been in place since Friday, and it's basically established for anyone who wants to talk about problems in the Department, but I think I would like to ask Jerry to—

Mr. HINCH. Thank you, Mr. Secretary. Basically, we are trying to address some of the concerns raised in the Inspector General's report. That people didn't know how to file a complaint or where to file a complaint or how to learn the status of their complaint or to get advice or assistance about sensitive situations, if you will.

So when you call in, you're familiar with the system where after an opening message, thank you for calling, it says if your question is how to file a complaint or where to file a complaint, press one, and you go to one. If your question is what is the status of your complaint, press two. If you need assistance or have a situation you need to have advice on, press three.

Mr. QUINN. Ultimately, does the caller get a chance to talk to a real, live person?

Mr. HINCH. Well, here's what we're trying to do on that. If in fact in box No. 3, if you need assistance and advice, when we hear that, if it's something we can clear up immediately and easily, we will do that; but if it's something we need to go back to the person, we ask them to leave their phone number so we can come back to them and find out what it is, what is it that we can help you with, etc.

Mr. QUINN. Since it's been in since only Friday, it's tough to say what kind of response you've received.

Mr. HINCH. We anticipate, based upon the experience of the Inspector General with our hotline, probably 150-300 calls a day.

Mr. QUINN. Thank you, sir. Mr. Cowles, you talked about a letter you received from—

Mr. COWLES. Alma Lee, the President of the National VA Council.

Mr. QUINN. In her letter she supported the actions that have been taken thus far by the Secretary and the staff. I think many of us up here also support those efforts. In her letter does she talk about H.R. 1032 at all?

Mr. COWLES. Not that I remember. It was in reaction to the actions that Secretary Brown has taken in his letters and in the commitments he's made about changing the process.

Mr. QUINN. Will the staff here receive a copy of her letter at some point?

Mr. COWLES. Absolutely, we'll make that available to you.

Mr. QUINN. I'd be interested to know. It's likely that she may be as supportive of your efforts, Mr. Secretary, as her employees, over 1,000?

Mr. COWLES. 120,000.

Mr. QUINN. 120,000. May also be as supportive of H.R. 1032 if we ask that question.

Mr. COWLES. I think the union is very supportive of any effort made to in fact bring improvements to the system from the standpoint of employee perception and fairness.

Mr. QUINN. I guess that's the point that I want to reiterate. Thank you for the answers to those questions. We want to bring whatever clout we can to this effort, Mr. Secretary. I think what we've heard here today is that's what this committee wants to do, as Mr. Smith said, in a bipartisan manner.

We want to give you that independence. We want to strengthen the efforts and the improvements you've already made. We want to help you, and from what I've seen of some of the reactions up here on the Hill the first 3 months that I've been here, that's not always the case.

I think we've got a situation here where we've got a committee and a chairman and staff who want to do what they can to help you, and I'm hoping you can see your way clear to take it as that only, not a way to point the finger at your agency.

I come from a town government. I was a town supervisor back in upstate New York. We had some problems of this nature in a department of fifteen departments in our town government. We dealt with it in that department. That department became a leader for town government and an example for the rest of the towns in western New York, as a matter of fact, and it's very possible, as others have said this morning, that our action, with your help over these next few months, may allow the VA to become the star, the example, the leader. I think we can do it, if we put our heads together on this one. Thank you, Mr. Chairman.

Mr. EVANS. The gentlewoman from Florida, Ms. Brown.

#### OPENING STATEMENT OF HON. CORRINE BROWN

Ms. BROWN. Thank you, Mr. Chairman. First of all, Chairman Montgomery is not here, but I want to commend him for his introducing H.R. 1032 on employment discrimination; but I guess I feel like I need to say publicly to Secretary Brown that your stand against employment discrimination and sexual harassment has been the strongest of any Secretary in State government. I think we need to take that into consideration.

I mean, clearly, the key to solving these problems come from the top and comes from leadership, and we have leadership. I think, even though I support the bill, that we need to give some leeway to the Secretary—he's new—to work with these problems. These prob-

lems are comprehensive and throughout Federal Government, and I guess I do have some problems in just singling out VA.

So I want to just thank you, Mr. Chairman, for your leadership. I think we are lucky to have you as the Secretary, and the country is lucky to have you in your position.

Secretary BROWN. Thank you.

Mr. EVANS. The gentleman from Florida, Mr. Bilirakis.

#### OPENING STATEMENT OF MICHAEL BILIRAKIS

Mr. BILIRAKIS. Thank you, Mr. Chairman. First I would ask unanimous consent. I have a very brief opening statement that might be made a part of the record.

Mr. EVANS. Without objection, so ordered.

[The prepared statement of Congressman Bilirakis appears on p. 89.]

Mr. BILIRAKIS. I thank you. Mr. Secretary, my colleague from Florida sort of beat me to the punch, and she's also hiding you from my view. I commend you. You haven't been Secretary very long, and you have really worked hard on this issue, and I really do commend you.

You know, I'm concerned that you take our attitude the right way. I oftentimes worry about this ivory tower, the Congress of the United States, for the most part not really having the practical experience in a lot of matters, basically mandating and shoving down the public's throat and other agencies and departments of government's throats laws when basically we have no idea how in the world they're going to function.

So I am concerned about that, but I also think that you should understand, sir, that you may be and, hopefully, you will be Secretary of the Veterans' Administration for sometime. I trust not more than 4 years, but—I had to say that—but the point of the matter is, there will be a new Secretary, as you are a new Secretary, and whatever you put into force probably will not outlive you. We don't know that it will.

This is where sometimes it's very significant to be concerned with codifying maybe some of the good things that are taking place. I should think that the attitude on the part of you and your staff and the attitude on the part of this committee should be not so much why are the VA is singled out. We're not singling out the VA, although in a sense we are. This is the Veterans Committee.

One of the other gentlemen, Mr. Linder, said it earlier. This is the Veterans Committee, and we are concerned with, and we should be concerned with anything that happens involving veterans. So, consequently, we're not singling out, I don't think, the Veterans' Administration because we think they're worse than anybody else, as far as this subject is concerned; but we decided, well, whether we take the lead or don't take the lead, the fact is that we feel that it's got to be addressed.

You're doing a great job, and we want to work with you. Frankly, I think a lot of these things ought to be codified, put into statute so that when your replacement comes around, they're not going to see fit to make some changes, because it is a part of the law



rather than a local regulation or local edict on your part. I think that's very important.

You believe that your changes should be given an opportunity to work. I think that's fair. I don't really know how far that should go in terms of time, but I think we ought to be working together. No, you don't oppose the legislation, as others have said, but you also don't support it, and you have indicated why you don't support it.

I think there are some concerns with the way that you are contemplating the job. There have been these terms strewn around here that Mr. Smith is not happy about, but I'll call them potential conflicts of interest or, to use your word, perception, perception in the eyes of the veterans, perception in the eyes of the public; but I find the distinction important between an ALJ, administrative law judge, and the Office of General Counsel. I really do.

I think the decisions made by ALJs, in spite of the fact that they may be getting paid by the Veterans' Administration, are to be looked upon as being completely different than the Office of General Counsel, which is just part of the organizational chart, if you will, of the Veterans' Administration. So there is a distinction there, sir.

I guess I wanted to ask what the role of the VA's Office of General Counsel would be, but Ms. Bloss has explained that to us, and I think it merely sets out, really, the reason why there's got to be some independence; and maybe it has to go as far as the independent agency you referred to, but I like to think that the ALJ at least is in a much better position as far as perception is concerned than the General Counsel's office goes.

I don't know if you have any comments to everything that I've said, but the bottom line is let's work together, for crying out loud, in order to get this thing done rather than fight each other.

Secretary BROWN. I agree with you, sir. As I mentioned earlier and I've mentioned over and over and over, your intent is well served.

Mr. BILIRAKIS. Yes, you have said that.

Secretary BROWN. I don't think anyone disagrees with that, but this perception thing really troubles me. There's much precedent for it. As you know, in the Veterans' Administration for many, many years the court of last resort was the Board of Veterans' Appeals, but there was always that perception.

The Board is a separate independent entity making the final decision for the Secretary, but the perception that because it is VA employees making that final decision, it was inherently unfair. That is the reason why today we have the Court of Veterans Appeals.

It created a whole separate independent process that makes the final decision—well, not the final decision, but the first decision that's outside of the Veterans' Administration. This is the same general principle.

Mr. Clyburn talked about trust. That's what we want. We want the VA employees to trust the system to do the right thing without the institutional biases, that result because you have all these people knowing each other for years and years and years.

Mr. BILIRAKIS. Well, but you have also said, sir, and I don't disagree with any of your statements, sir, but you have also said very

quickly that much of what we are proposing in our legislation is something that you are actually putting into force internally.

Secretary BROWN. Yes, sir.

Mr. BILIRAKIS. That's fine, but I guess again my point is, and I'm sure you caught it earlier, that it may be good as long as you're Secretary of the VA. Then somebody else comes around and changes it, conceivably, and that's where, again, the importance is of codification.

Secretary BROWN. Yes, sir.

Mr. BILIRAKIS. Thank you very much. Thank you, Mr. Chairman.

Mr. EVANS. The gentleman from Georgia, Dr. Roy Rowland.

Dr. ROWLAND. Welcome, Mr. Secretary.

Secretary BROWN. Yes, sir, how are you?

#### OPENING STATEMENT OF HON. J. ROY ROWLAND

Dr. ROWLAND. Good to see you here this morning, and I trust that you will be Secretary for 8 years, if you desire to do that, irrespective of what my friend from Florida said.

Listening to you express your opinion about this piece of legislation that's pending before our committee this morning, I understood you to say that you did not oppose that legislation nor did you support it either, that you could in fact do what you thought needed to be done administratively and are moving in that direction.

Mr. Secretary, I don't believe that the hospital and health care system, the Department of Veterans Affairs, is any worse or any better than any other department or agency in government. I see no reason to believe that it is. The fact is that, however, the perception is there because of what happened in Atlanta. The focus was placed there, and it seemed that there was a ripple effect that spread throughout the hospital and health care system in the VA.

I look at this piece of legislation not as being antagonistic to what you want to do. In fact, I look at this piece of legislation as perhaps being a prototype of what other agencies or departments in government may want to do if it is implemented in the Department of Veterans Affairs and is successful. That's the way that I perceive this legislation and would hope that it would work in that manner.

That's the reason that I am a co-sponsor of the legislation. I know that one of the reasons that you have stated that you do not support the legislation is because you feel that it is discriminating against the VA, and I do not believe that that is the case at all. I just wanted to make that clear, from my standpoint.

Let me ask you what's going on in Atlanta right now. That's my home state. My understanding is that the morale is much better there, that essentially there is not the kind of problem that existed at all there now, but what are you hearing from the VA?

You mentioned the hotline that is available. Are you still hearing from incidents that occurred prior to the exposure of the problems there or are they incidents that are occurring since the exposure of that problem?

Secretary BROWN. Since we issued numerous letters to the employees there, the all station letters, letters that deal with the ques-

tion of retaliation, we are now getting additional complaints or at least people are now coming forward.

Dr. ROWLAND. Relative to retaliation?

Secretary BROWN. Yes, sir. Well, not necessarily. Let me back up. Relative to the issue that we thought we had finally adjudicated. Now people are saying: Well, I didn't come forward initially, because I was afraid I would be retaliated against.

Now because of the new and exciting work atmosphere we are creating by trying to change this whole process administratively, people are now willing to come forward. Ladies are coming forward, and providing us new information. We are looking very carefully at that information in terms of the entire process we have already looked at.

I would like Steve to make additional observations on that.

Mr. TRODDEN. Mr. Rowland, Steve Trodden, the Inspector General. I'd like to affirm the statement that the Secretary just made. He stated previously that he had asked his Deputy Secretary to write all the employees at Atlanta that there will be no reprisal.

He also asked me to follow up with all the witnesses that we interviewed for our IG report at Atlanta, to touch base with them personally to make sure they had received a copy of the Deputy Secretary's memorandum. We have done that.

I added one thing on my hook to those phone calls that we made. We also asked each and every one of those witnesses specifically: (a) Is the climate any better now than it was previously, and (b) are you experiencing any reprisal as a result of your participation with our investigation?

The answer to (a) overwhelmingly was that there is a much different and better climate at Atlanta today than there ever has been before, and (b) with regard to reprisal, out of the thirty-six calls we made, there are a total of two or three who have made statements that at least smack of reprisal.

We have opened up full blown cases on them. I can assure this committee, there is nothing I take more seriously than an alleged act of reprisal against anybody who has cooperated with me or my investigators. So we'll get to the bottom of that.

Then, lastly, in support of the Secretary's statement I want the committee to know that my report was based on numerous depositions of witnesses at Atlanta, not all of whom were willing to have their anonymity released, even after I published my report.

So originally, there was a difference between the number of witnesses that undergirded my report versus those witnesses that would come forward to testify in disciplinary actions against the individuals involved. What I'm saying is I had more witnesses than the Department had in their personnel proceeding, simply because I couldn't originally convince some of them that they should have their anonymity released and that they should become full blown witnesses.

I think what the Secretary is saying is that we have now convinced three of four of our anonymous witnesses to release their anonymity and to step forward and testify against the individuals involved. I don't want to over-generalize, but it certainly is a signal that some people perceive the atmosphere to have changed enough

that their fear has subsided and that they are willing to make their anonymity known.

Dr. ROWLAND. Mr Chairman, I had just one additional question I want to ask relative to the other hospitals of the 170 hospitals now. Since the exposure of what took place in Atlanta, has there been an overflow of complaints coming from other hospitals throughout the VA system?

I guess what I'm wondering is, is Atlanta an exception to what is going on throughout the entire hospital and health care system, and could we base an assumption about that based on what you are hearing now from other hospitals?

Secretary BROWN. I would be afraid to draw any conclusions at this point. As you know, there are two GAO studies that are being conducted right now that, hopefully, will shed some light on this question, but I can tell you that, based upon the information that we have available, VA complaints range are about 4.7 per 1,000 employees as opposed to the Government-wide complaints of 5.5 per 1,000 employees.

So we fall below the average there, and I don't think—I would be surprised, and this is not a statement based upon information that I have, but I would be surprised if we are any different from our society at large. I think we reflect what's going on in society as opposed to some special characteristics of the people that are employed by the Veterans' Administration.

Mr. EVANS. The gentlewoman from California, Ms. Waters.

#### OPENING STATEMENT OF HON. MAXINE WATERS

Ms. WATERS. Thank you very much, Mr. Chairman. I, too, would like to join with my colleagues in welcoming our new Secretary and tell you how delighted we are to have you in this role. Those of us who have worked with you really respect all of your contributions, and we really do believe that your appointment will help to move this agency forward in ways that many of us have envisioned for a long time. So, thank you very much for being here this morning.

I have had to play catch-up here in trying to understand what the differences of opinion are, and as I see it, you are basically saying to us that you recognize that there has been a problem and that you have taken some steps thus far to try and deal with what has been a problem in the Department, and you would like us to allow you to try and let your new process work.

At the same time, this legislation appears to put together a procedure with an attempt also to address those problems, and I'm trying to find out where the real differences are here and if there is any room for the two to come together. You say that you can do administratively what needs to be done, and there is no need to put some of this into law.

I think when I look at that side of the argument, I kind of feel, really, if it's good enough administratively, it's good enough for law, and maybe it institutionalizes, you know, some way of dealing with the problem; but let me just ask you this. The director that's contemplated in the legislation—how is that director selected? Can someone tell me? Where does the director come from, of the—

Mr. EVANS. The counsel of the committee to answer that question.

Mr. RYAN. The answer is that the director would be appointed by the Secretary.

Ms. WATERS. The director would be appointed by the Secretary, which means that there is nothing in this bill that takes away your authority. You still are responsible for whatever takes place in dealing with issues of discrimination.

Tell me, if I've missed it, exactly what in this bill would either hamper your ability to be in charge of making sure that these complaints are not handled in an expeditious and fair way or what in the bill complicates your ability to be able to resolve discrimination complaints. Tell me what it is in this bill that you would like to see removed or improved upon in ways that would give you the power, the ability to do what you need to have done.

Secretary BROWN. I do not take issue with provisions of the bill, because I think the points made in the bill are very good points; and they strengthen the process. However, I feel that we can accomplish those administratively.

If we are going to enact legislation, I don't want to select the director. I think the director should be selected by someone outside of VA. It's almost having the equivalent of a mini-court outside the structure. I think it brings integrity to the process.

Ms. WATERS. Well, how would your process work in the absence of this legislation? What about your process is more independent than this process?

Secretary BROWN. Nothing. We would probably end up adopting just about everything you have here, because these are good ideas that we can institute administratively.

Ms. WATERS. So your only real objection is that it is done legislatively instead of administratively?

Secretary BROWN. That's exactly right. If we move it just a little bit further, if we are going to make changes, we see no reason we should end up adjudicating complaints that are filed against ourselves. That, to me, doesn't do anything to enhance the integrity of the process.

Ms. WATERS. So if you had to take this legislation and offer some suggestions about how to make it better, incorporating much of what's already here, what would your specific suggestions be?

Secretary BROWN. I would create an agency that is separate and independent outside of the Veterans' Administration and, hopefully, that agency would have the responsibility to adjudicate—to investigate and adjudicate all discrimination and sexual harassment.

Ms. WATERS. So what you would do is basically not receive any complaints but say go to EEOC, because we have a separate agency that does that. So, basically, what you're describing is removing the Veterans Affairs from the process altogether and simply saying to your employees, we have another agency whose responsibility this is, you take your complaint to EEOC. Isn't that what you're describing?

Secretary BROWN. Well, not EEOC.

Ms. WATERS. Or whatever.

Secretary BROWN. Well, okay, if we want to call it EEOC, that's fine. The only thing that we probably would retain would be our

counselors. We know that that process worked, and we can probably resolve approximately 70 percent of those complaints, based upon our experience.

For the rest of them, where it's going to require a formal complaint that's going to require an investigation, we would want that done by an independent agency.

Ms. WATERS. So you would basically want the system to work as it works now with your strengthened relationship to the counselors and the other kinds of things that you have done inside the establishment of the 800 number, the ongoing communications with all employees, etc. You would kind of want the system to remain intact with just your strengthened relationship and communications with counselors and employees inside the agency. That's kind of what you're describing.

Secretary BROWN. I think so. All we would retain would be our counselors inside the agency, the informal process inside the agency. Once it's formalized, that whole adjudication process would take place outside the agency.

Ms. WATERS. Do you see any harm in having a formal process inside the agency? What kind of complications does that bring to—

Secretary BROWN. It brings a perception of unfairness. Even though we are an organization of close to 260,000 people, we have very close ties, very close networks. We belong to similar organizations. Probably, if you take the directors, they meet probably five, six, seven times a year. It wouldn't surprise me if the same is true for the chiefs of staffs, the assistant directors and so forth.

I think it's a flawed process where you have people potentially involved in the complaint itself, making decisions about the complaint.

Ms. WATERS. Describe an example to me.

Secretary BROWN. One classic example is what took place in Atlanta. There we had the director involved. We had the chief of staff involved. We had the EEO officer or one of the counselors involved and some other people. They were responsible for identifying and recommending the EEO counselor, the investigators and all of that.

So when we called down there, they were able to say everything is all right. The people were investigating complaints against folks they knew.

Ms. WATERS. But wouldn't that be the case under the situation that you are describing, even though you talk about you have strengthened the ability to do a better job, but wouldn't that still be the case under your system?

Secretary BROWN. Yes. That is still one of the weaknesses of the system. Therefore, if you are going to make institutional changes, let's give it some fire. Let's put some steel into the process.

Ms. WATERS. Well, here's where I think, just talking with you now—and Mr. Chairman, I know. If I may—

Mr. EVANS. The gentlewoman may proceed. I'm next, and I'll probably go 10 minutes or so.

Ms. WATERS. All right. Thank you very much. If I may, it appears to me that we have a system that you're describing, even with changes, even with advocacy on your part, is flawed because

of human nature, because people, whether they are in charge or not, still have the ability in the system to be a perpetrator and—

Secretary BROWN. And influence the process.

Ms. WATERS (continuing). And influence the process. The system that is being brought forth in this bill, you still have the same problems. You have, even though you establish a separate department, an opportunity for those who make decisions to influence the process.

So given that you have, you know, human weaknesses, no matter what we do, are you sure you are saying if you had—your absolute will could be worked in this case, you would like to remove the department for the most part and simply give it to someone else and not have any responsibility in it?

Secretary BROWN. Absolutely. That is exactly what I'm saying.

Ms. WATERS. Well, let me just say this, Mr. Secretary. I think that listening to this, and I'm going to have to think about it a little bit more, but just listening to what I'm hearing right now, I don't think we can remove the responsibility of the Secretary from the problems of his or her department, no matter how difficult they are, whether we are—and I'm really, really interested in this department because of the longstanding complaints about racial discrimination, long before sexual discrimination came to the forefront.

I mean, I'm just so glad we're talking about it. If sexual complaints have triggered all of us from both sides of the aisle joining together to say we got to do something about discrimination, period, then I'm just real excited, and I want it to be the very best thing that we can do; but as I listen to you, I don't know how we remove the Secretary of any department from having, you know, that role. The buck stops here.

Having the role of being responsible for carrying out the law, whatever it is, for seeing to it that complaints are handled, that people who have responsibility for those complaints have to report directly to the Secretary—I don't know how we remove any Secretary from part of that responsibility, even if in the final analysis, you know, it ends up within the courts or someplace.

I don't know how we take you out of all of that and say, I want it to be so fair that we really don't have a lot to do with this, you know, in formalizing it in any way. I don't know how we do that.

Mr. BILIRAKIS. Would the gentlewoman yield?

Ms. WATERS. Yes.

Mr. BILIRAKIS. And right on point, and you certainly have approached it, in my opinion, very, very logically, step by step by step. I wonder if we could take the—I don't mean to embarrass him. I think he knows the answers—the counsel here or anybody else that might be appropriate, and explain to us very briefly the process of the administrative law judges.

The Secretary is concerned about perception, and well he should be, because as we know, quite often that can be more significant in the minds of people than facts. If the administrative law judges are perceived to be clearly within the structure of the Veterans' Administration, then I think his concern is valid.

On the other hand, if they work differently, as I understand they do—the word independent is there and everything of that nature—

then maybe the Secretary's concern will not be quite as serious insofar as the ALJ being a part of it. Isn't this consistent with what—

Ms. WATERS. Yes. Yes, I think you are going in the direction that I'm trying to get to.

Mr. BILIRAKIS. Right. I could see that.

Ms. WATERS. Yes.

Mr. BILIRAKIS. Could you very briefly clear us up on that, sir?

Mr. EVANS. Would the gentlewoman yield?

Ms. WATERS. Yes, I yield.

Mr. RYAN. Mr. Bilirakis, is your question what protections exist to safeguard the independence of administrative law judges?

Mr. BILIRAKIS. I suppose you might put it that way. How are they initially—

Ms. WATERS. How are they selected?

Mr. BILIRAKIS (continuing). Hired? Right. How are they initially hired, selected, and how do they then become a part of this process, as they do regarding Social Security and other areas in which they are used?

Mr. RYAN. The Post Office and Civil Service Committee or the Judiciary Committee has established a separate procedure for persons who seek to become administrative law judges. Basically, once an administrative law judge is appointed by an agency, his or her salary is not influenced by the agency's view of his or her decisions. There are very limited actions the agency can take against them, either to affect their salary or to remove them from office.

Basically, they are free to exercise their judgment and can only be removed if they fail to perform their duties.

Mr. BILIRAKIS. Who can remove them?

Mr. RYAN. The Secretary could take actions to remove them, but I think in recent memory few if any administrative law judges have been removed. It's a very competitive position. There are many well-qualified attorneys seeking to become administrative law judges, and there is a guaranteed salary structure, so that promotions cannot be withheld. There are also other statutory and regulatory protections against undue agency influence.

Ms. WATERS. On my time, could you describe to me the administrative law judges in the VA now? You do use—

Secretary BROWN. No, we don't have any.

Ms. WATERS. You don't use any now? So we would be getting these for the first time.

Mr. BILIRAKIS. Who would be hiring these people? Would it be the Secretary hiring them or is there a pool, so to speak? Are they hired, and there's a pool, and then they are assigned by somebody or other to various departments?

Mr. RYAN. The agency would identify its need for administrative law judges, and OPM would furnish the names of candidates.

Ms. WATERS. Who would?

Mr. RYAN. The Office of Personnel Management maintains the register of candidates who are seeking to become administrative law judges, and the Secretary would appoint these individuals. There's a constitutional requirement that they work inside the executive branch, but once they are appointed, there are a fair number of statutory protections.



Ms. WATERS. So the Secretary would appoint from a list?

Mr. RYAN. Yes, ma'am. That's my understanding.

Mr. BILIRAKIS. So that takes a little bit away from the independence, doesn't it?

Ms. WATERS. Well, a little bit.

Mr. BILIRAKIS. I think, if I were the Secretary, depending, I guess, on what my mental make-up might be, I might be looking for more conservative administrative law judges or more liberal or more veteran oriented or—I don't know.

Mr. RYAN. Mr. Bilirakis, it's my understanding that the Office of Personnel Management will only submit three names to the Secretary, and he either has to select one of those three names or decide not to fill the position.

Ms. WATERS. The administrative law judges would not be a panel? It would be one person?

Mr. RYAN. There could be any number.

Ms. WATERS. What does this bill call for?

Mr. RYAN. As many as are needed.

Ms. WATERS. So what we could do is we could have a panel that, by law in this bill, we could help give some shape and form to, that would have to represent—come from—that could have enough diversity in it where we could ensure that women would be on the panel by law. We could ensure that it would be diverse by law. We could do that, couldn't we?

Mr. RYAN. All of those requirements are set forth in title 5 of the United States Code, which is not a matter that this committee has jurisdiction over.

Ms. WATERS. No, no, no, I didn't ask you that. I said, in this bill, if we want to make law, and that's what we do—we make law.

Mr. RYAN. Yes, ma'am.

Ms. WATERS. If we wanted to put some shape and form to a panel and talk about even the number to ensure that we have some diversity and we don't end up with one or two or three all white males, we could do that, couldn't we, by law?

Mr. RYAN. You could do that by law. If this committee reported such legislation, it would likely amend the existing procedure and would be sequentially referred to the committee with jurisdiction over the appointment of administrative law judges, where they may or may not agree with us.

Ms. WATERS. That's okay, but that's what we are. We're law makers, and when we are making law, we want to do the best job that we can. The more I look at this, the more some more thought needs to go into the making of this law. I think this bill has a lot of potential, and I'm coming down on the side of.

The Secretary cannot remove him or herself from the responsibility of making sure that it is the best agency possible, and that they have a role in resolving whatever the problems are, but the Secretary makes a good case for whether or not the process has the appearance, certainly, and absolute process of fairness and independence and all of those things, and I think that we could help him out some as we proceed with putting this law together.

All that I can end with, Mr. Chairman, at this point is this. Obviously, there is a consensus forming on this committee. You know, you just kind of learn how to count in this business, and as I listen

to the members, what I see is bipartisan support for doing something.

As you explained to us your concerns, while I think a number of us are very sympathetic, I think it would behoove you at this point to try and take a look at what is being attempted here, and see if you can offer some suggestions to make it the kind of legislation that would at least give some attention to your concerns.

As I give it this kind of going over in a very short period of time, it appears that there may be some room for that as you look at the administrative judges, how many they should be, what the make-up of that pool should be. I think you don't have to be a victim of getting any old thing you're sent and picking one of three that comes up through the system, because part of what's wrong in dealing with discrimination cases and sexual harassment is the overall system has not respected these concerns.

So don't just sit and get steamrolled over as this consensus is formed. Be creative, Mr. Secretary, in my opinion, and see how you can get a piece of this bill and make it work in ways that would give you the ability to not only have some responsibility but to ensure that the process is as fair and as independent as it could be, and I think you may have a little room to do that now. Go put your thinking caps on. That's my suggestion to you.

Thank you very much, Mr. Chairman. Mr. Chairman, I'd like unanimous consent to submit for the record a little opening statement that I have.

Mr. EVANS. Without objection, so ordered.

Ms. WATERS. Thank you very much.

[The statement of Hon. Maxine Waters appears on p. 94.]

Mr. EVANS. Would the Secretary or anyone want to respond at this point?

Let me ask my two remaining colleagues, actually three remaining colleagues if they have any other questions. I've got a number and would be glad to yield to the gentleman from South Carolina.

Mr. CLYBURN. Yes. Mr. Chairman, I would like unanimous consent to have my opening statement entered into the record.

Mr. EVANS. Without objection, so ordered.

[The prepared statement of Congressman Clyburn appears on p. 91.]

Mr. EVANS. All right. Mr. Secretary, let me also welcome you here today. I appreciate this opportunity. I know you've been here before us for quite sometime this morning, and you've answered questions in depth. I wanted to tell you that last September my subcommittee held a hearing on this specific topic, and the testimony was the most powerful I think I've heard in my 10 years in Congress.

I believe that your actions since taking the Secretary of Veterans Affairs helm have been a quantum leap, really, in terms of the attitude of dealing with these problems. The four hour training that will be required over 2 years is something that I had advocated.

I asked the previous acting administrator if he could do what we call in the Navy and the Marine Corps a standdown and get people together to focus on this specific issue. The fact that you're not only focusing on sexual harassment but sexual discrimination, I think, is also very important.

I know you will be developing statements and guidelines in terms of offensive conduct and so forth. These are all very important steps, but I think you can sense, as Congresswoman Waters indicated and as Congressman Bilirakis has indicated, that we have a bipartisan consensus growing on this committee that we shouldn't just take these steps administratively.

We should have something put into law so that, if you are not here in 2, 4, 6 or 8 years, these improvements will live on beyond your tenure as head of the VA. So I have a number of questions concerning various aspects of the testimony, and they are in no particular order.

My one general concern is in your testimony you stated that Federal employees should receive the same rights and treatment, regardless of the employing agency. We're both former Marines. Don't you think the VA should be number one, as we had hoped the Marine Corps would be number one, in according people the best possible protection and prevention, for that matter, from sexual harassment and sexual discrimination?

Secretary BROWN. I'd like to see that America is number one. This is not just a VA problem. We would be fooling ourselves if we thought that was the case. What we are seeing here is just a small version of what's taking place all across this land, and we need to take a systematic approach to identifying the problems and some meaningful resolutions to those problems.

Mr. EVANS. Well, I understand that VA employees live in this society and that the society is rife with many problems dealing with these respective areas of sexual harassment and sexual discrimination. At the same time, according to the Merit Protections Systems—or the Merit Systems Protection Board, excuse me, the VA is rated number two in terms of perceived harassment within the Veterans' Administration as far as women claimants are concerned and number one as far as male complainants are concerned about sexual harassment toward themselves.

So it seems to me that, while we have a societal problem, we ought to be in the leadership in trying to do much more to deal with the problems. We're going to require the private sector to live up to high standards affecting—dealing with sexual discrimination and sexual harassment. We ought to be first requiring the Federal Government to do so.

So I think, while we may have the same problems that other institutions have throughout our society, the perception is that it's worse in the Veterans' Administration. So we deal with that perception in a way which will encourage people that feel they have been discriminated or harassed to come forward or we're going to have continued problems within the Veterans' Administration.

I guess my question would be: You're asking for us to give you the time. What have you specifically requested in the budget for next year to deal with this specific problem?

Secretary BROWN. Approximately \$9 million.

Mr. EVANS. How much would that—What would that translate into in terms of—Is that an increase at this point?

Mr. HINCH. For us, that's a significant increase, sir.

Mr. EVANS. Do you know how much of an increase?

Mr. HINCH. The difficulty is, in my office in particular, we're talking about \$2 million. The Secretary is examining the proposal to add an additional \$3 million directly to my office, which would be probably a reallocation of funds from some of the other offices that now have this part-time collateral duty responsibilities for EEO.

So we would see my office, if the Secretary decides to go that direction, acquiring about \$5 million which would provide the basis for establishing an independent field office for the investigation of EEO complaints and for much closer oversight monitoring of the entire program.

Mr. EVANS. And that will be in the budget? That would be in the budget, Mr. Secretary?

Secretary BROWN. Yes. It would be in the budget, because we would absorb that cost.

Mr. EVANS. All right. Absorbing it and then you're getting an increase generally, I understand.

Secretary BROWN. Yes. The President has been very kind to us.

Mr. EVANS. Secretary Brown or Mr. Trodden, should the VA employees be exempt from the Whistleblowers Protection Act, and would you support legislation to include employees under the protections offered by that law, in both your personal opinions?

Secretary BROWN. Should they be exempt?

Mr. EVANS. Should they be included—or should they be exempt? Excuse me.

Secretary BROWN. No. No, absolutely.

Mr. EVANS. Would you support legislation then to include employees under the protections offered by that law?

Secretary BROWN. Yes.

Mr. EVANS. Okay. If I could ask Ms. Bloss. You are one of the top agency experts in civil rights and EEO matters, are you not? Is that correct?

Ms. BLOSS. Yes.

Mr. EVANS. Okay. How long have you been involved in such matters?

Ms. BLOSS. About 12 years.

Mr. EVANS. All right. Is there anything in the text of the legislation that the chairman has introduced which would change an employee's right to a trial de novo in U.S. District Court?

Ms. BLOSS. No. We read the bill to contain that right.

Mr. EVANS. All right. Is there anything in this same legislation that would take away employees' rights under the Civil Rights Act of 1991?

Ms. BLOSS. It may, because the Civil Rights Act is not specifically mentioned in the bill, but it could easily be amended to contain that right.

Mr. EVANS. Is there any basis in the bill for the American Federation of Government Employees saying that this legislation would take away these employee rights?

Ms. BLOSS. Yes, probably, but again it could be easily amended.

Mr. EVANS. But on the same grounds as the civil rights?

Ms. BLOSS. Yes.

Mr. EVANS. Mr. Trodden, the staff of the committee were briefed 4 months ago on your review of the EEO process. When do you plan to release this report?

Mr. TRODDEN. Mr. Chairman, we have been working very hard with the new administration to get comments to our draft report. We have recently received those comments. They are very forthcoming. They are very consistent with the testimony you heard here today, and I would expect to issue our final report within the month.

Mr. EVANS. All right. Mr. Secretary, if I understand your proposal to create an outside agency, that would be some kind of an enhanced EEOC kind of program?

Secretary BROWN. Yes, sir.

Mr. EVANS. Is this your preference or is this the position of the Clinton administration?

Secretary BROWN. It's both.

Mr. EVANS. It's the official position of the Clinton administration to establish a more independent and more—

Secretary BROWN. Yes. Ask the question again.

Mr. EVANS. Is it the official position of the Clinton administration?

Secretary BROWN. Yes, it is.

Mr. EVANS. All right. Would this be kind of a Government-wide kind of agency then at that point, dealing with all the different departments in government?

Secretary BROWN. Yes.

[The information follows:]

Mr. Brown subsequently advised that his answers were intended to reflect the position that issues of this nature should be addressed on a Government-wide basis, rather than on a piecemeal, agency-by-agency basis; they were not intended to reflect a position supporting any particular change in the process.

Mr. EVANS. All right. Would there be increased resources offered in the immediate future by the administration to fund this agency?

Secretary BROWN. We have not looked at it in that light. As you know, there are basically three bills that deal with this subject, H.R. 1032 and there are two bills in the Senate that—which takes a more global approach to resolving the problem by creating an independent agency.

Mr. EVANS. All right. I have no further questions. If there are any other—

Secretary BROWN. Excuse me. For the record, there's two in the House and one in the Senate. Is that right?

Mr. EVANS. All right, Mr. Secretary. We thank you and your panel very much for staying with us so long this morning.

Secretary BROWN. Thank you, sir.

Mr. EVANS. Thank you. Our next witnesses are Bette Davis, Len Gilmer, Bob Manhan and Nancy Kingsbury, if they would come forward at this time and be seated at the witness table.

Bette is President of NOVA, the Nurses Organization of Veterans Affairs, and does a great job. Len is Associate National Employment Director of DAV. Bob is Assistant Director, National Legislative Service for the VFW. Nancy is the recently appointed Director of Federal Human Resource Management Issues, General Government Division at GAO, and we congratulate her on her ap-

pointment and welcome her to the committee and look forward to working with you in the future.

Each of your statements will be made part of the record, and we will wait for you to be seated to proceed. Ms. Davis, you may start when you're ready.

**STATEMENTS OF BETTE L. DAVIS, MSN, RN, CS, PRESIDENT, NURSES ORGANIZATIONS OF VETERANS AFFAIRS; LENNOX E. GILMER, ASSOCIATE NATIONAL EMPLOYMENT DIRECTOR, DISABLED AMERICAN VETERANS; BOB MANHAN, ASSISTANT DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE U.S.; NANCY R. KINGSBURY, DIRECTOR, FEDERAL HUMAN RESOURCE MANAGEMENT ISSUES, GENERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING OFFICE**

#### **STATEMENT OF BETTE L. DAVIS**

Ms. DAVIS. Okay. Mr. Chairman and members of the committee, I'm Bette Davis, a clinical nurse specialist at the Washington, DC, VA Medical Center, President of the Nurse's Organization of Veterans Affairs, NOVA. I'm testifying on behalf of NOVA, speaking for more than 39,000 VA nurses.

NOVA recognizes that today's important legislation, H.R. 1032, the Department of Veterans Affairs Employment Discrimination Act, will help ensure an impartial delivery of EEO services provided by VA to employees who experience or may experience acts of discrimination in the workplace. NOVA endorses the establishment of an independent office in the Department of Veterans Affairs to handle all discrimination complaints, including complaints of sexual harassment.

A separate office of employment discrimination complaints headed by a director who reports directly to the Deputy Secretary and the Secretary lends credence to the notion that the head of the agency can do something, be accountable, since each case can be carried through the EEO investigation to the Secretary independent of the hospital director.

Under the current system, the locally controlled complaint processing system can delay formal complaint processing for years, because it can be used to protect local offenders. NOVA endorses the proposal to employ full time, permanent EEO counselors who will be better trained and independent of local managers.

Outside, professionally trained staff, knowledgeable of criteria regarding EEO discrimination will afford both parties the opportunity for impartial reviews in identifying and resolving discrimination complaints. Currently, EEO counselors have full time jobs in addition to their assignments as counselors. At any one time a counselor may have as many as five or six cases, which ultimately affects patient care and proficiency.

EEO counselors have expressed the feeling of being caught between the complainant and the defendant, especially if the complaint was not resolved at the lowest level or the resolution wasn't perceived as satisfactory. Although many cases are said to be positive and rewarding experiences for the counselors, doing the job is full of hassles, getting papers typed, finding a private meeting place, obtaining forms, seeking additional information and guid-

ance and, most of all, finding a biased position in personnel service if someone in high-up management is involved. These are just a few of the common occurrences.

Clearly, it is preferable that the counselor not be an employee of the facility where the complaint originates. For formal complaints, NOVA applauds the utilization of professionally trained, full time, permanent investigators to investigate and prepare reports for administrative law judges who then determine whether the complaint is accepted for investigation in accordance with regulations of the Equal Employment Opportunity Commission.

This should produce a more just and efficient process compared to the current practice of using VA employees to conduct investigations while on administrative leave from their regular, full time jobs.

Legislation to require use of administrative law judges throughout the decisionmaking process, including hearings, is an effort to ensure agency impartiality and demonstrates a commitment to those in the VA workforce, especially those who have experienced some kind of discrimination during their employment with VA. Removing this decisionmaking responsibility from the VA Office of General Counsel lessens the likelihood of a conflict of interest in defending the agency's actions and in advising agency officials.

A major concern to NOVA is how to define those acts of discrimination or failures to act which are less explicit or certain as determined by law, issues not openly acknowledged which exemplify a prejudicial attitude and fall within the category of discriminatory practices in the workplace that affect gender related occupations such as nursing, for an example. Registered nurses are the largest group within the Department. Yet, patient behavior problems seemingly are responded to more slowly when involving nurses.

For example, the decision to transfer a violent psychiatric patient to a more secure facility may not be made and was not made until a male physician was attacked, despite the fact that several nurses were attacked on earlier occasions.

Nurses are often harassed, assaulted or stalked by patients, especially those in psychiatric settings. Clearly, appropriate responses to ensure proper treatment of employees is just as important as the proper treatment of veterans in their daily face to face interaction.

It is often difficult to determine if nurses are being treated in a particular way because they are nurses or because they are women. Historically, nurses are taught to be subservient to the male and physician dominated hospital power structure. Consequently, there is great reluctance for the hospital hierarchy to share this level of authority with nurse executives, even though they carry twenty-four hour responsibility for nursing care to patients, without which there can be no hospitals.

Once again, NOVA raises the underlying issue of occupational and gender biased behavior at the highest levels of the organization and in each medical center. Over the years, NOVA has called for elevation of the VA Medical Center Chief Nurse position to the leadership triad with the medical center associate director and chief of staff.

This kind of exclusion from the authority level contributes to and encourages de facto discrimination against a large class of women in the Department.

In conclusion, NOVA applauds Chairman Montgomery and the members of this committee for this legislative initiative. Thank you, too, for the opportunity for NOVA to testify here today. I'm now available to answer your questions.

[The prepared statement of Ms. Davis appears on p. 101.]

Mr. CLYBURN (presiding). Thank you, Ms. Davis.

Next Mr. Lennox Gilmer.

#### STATEMENT OF LENNOX E. GILMER

Mr. GILMER. Mr. Chairman, members of the committee, I wish to thank you for this opportunity to present our views on H.R. 1032, the Department of Veterans Affairs Employment Discrimination Act.

Mr. Chairman, you, Vice Chairman Bob Stump, and the twenty-nine co-sponsors of this bill are to be commended for introducing this critical piece of legislation at this opportune time. We have submitted written testimony for the record, and ask that it be included.

Mr. Chairman, we appreciate recent efforts by the Veterans' Administration to improve the VA EEO process. However, we are not yet convinced they have gone far enough. In fact, we are concerned that, given what was described this morning, that VA administrators at the lower level are still too involved in appointing EEO personnel and, there is still assignment of collateral duties for EEO personnel which, our testimony points out, we find objectionable. We think there is a serious problem anytime you have collateral duties.

The question was asked this morning, why should this bill be considered? Anyone that's represented an EEO case in the VA over the past few years will know why there ought to be a new law. The Veterans' Administration probably has one of the worst records of any Federal agency for handling EEO cases.

More recently that EEO record has improved statistically, but when we look at data that says that 70 percent of these cases have been resolved at the lowest level, the informal complaint stage, it misses the point.

First of all, the VA considers cases that are withdrawn because the person is so frustrated they can't make any sense out of the process as being resolved, and that, of course, is nonsense. Unfortunately, the average person who files an EEO complaint, especially in an agency which is resistant to the EEO process—does not get help to understand what the EEO process is about and how the system is to work.

Unfortunately, this system has a record. It's notorious for the frustration it creates. No wonder people assume, that if they file an EEO complaint, nothing will come from it. They don't file. So the 70 percent figure is a nonsense figure.

Mr. Chairman, while the impetus for this legislation may be sexual harassment, this much needed legislation should dramati-



cally improve the processing of all civil rights complaints. We support the intent of H.R. 1032.

This bill, if enacted, goes a long way toward addressing perceptions that have demoralized many employees, because they felt there was no place to go when they were wronged. Many feel they work in a closed environment where the civil rights complaint processes are controlled by the administrators whose interests are better served when civil rights violations are covered up, not identified and addressed.

No one should find it strange that agency employees do not trust a system where the EEO counselor and the EEO investigator, regardless of how well meaning or technically proficient, perform their equal employment opportunity responsibilities as a collateral duty.

Thus, employees with EEO responsibilities are required to absent themselves from their own careers and advancement to ask probing and possibly self-destructive questions of peers and supervisors about alleged illegalities. This has contributed to a high turnover of EEO counselors and investigators. This obvious conflict of interest can only be seen as serving the interests of the agency.

The proposals put forward in this bill do a number of things which we absolutely support: (1) help to assure that systemic problems will not be covered over by lower level administrators who may be adversely impacted when civil rights violations are disclosed; (2) that the turnover of EEO counselors will be reduced, because this will be their job, not a collateral duty, and should provide for better trained staff with greater in depth knowledge of civil rights law, processes and complaint resolution techniques; (3) that agency adherence to employee rights and the implementation of the EEO process will improve.

We do have some concerns with this bill, and I won't go into all the details that we have in our statement which we have included for the record; but ALJs under title 5, United States Code, are restricted to certain activities.

Administrative law judges hold hearings. That's what they do. They don't make decisions about whether or not a case ought to be investigated. So if there is going to be a decision made by an ALJ under the current law in title 5, the ALJ will have to hold a hearing.

Our problem is that the EEO process should not require the person who is trying to process their complaint to have legal advice early on. With the introduction of an ALJ you're going to have a problem.

If ALJs are going to hold hearings just before the investigative stage or, in some cases as this bill proposes, just after or as a part of the informal resolution stage, the ALJ is going to conduct a hearing without an investigation.

The evidence which would be brought forward through the investigation on behalf of the complaining party would not be available for the hearing, and the individual now has to use discovery, which is commonly available in the court system, may have to call witnesses, may have to conduct examination, cross-examination, redirect. We're talking about, in most cases, complainants who we don't expect to be sophisticated in legal processes.

By formalizing the process early on, you introduce this difficulty. Now the complainant has to get legal advice to handle their complaint at what used to be an informal stage in a process that used to produce the evidence that they needed was at the investigative stage.

You have an additional problem in that there are court cases, which we cited in our written testimony, that says that administrative law judges don't get involved in the investigation. Which generally means that they don't make a decision about whether there will be an investigation. If you do involve them, then you bias the decisionmaking later on.

There are some solutions to the question of how do you provide more distance from the Administrator in the appointment of EEO personnel. Many Federal agencies have done that by creating a position of Chief Judge who makes the appointment of the ALJs. The Chief Judge would be appointed by the Secretary, in most agencies.

Mr. Chairman, I appreciate the opportunity to provide this testimony. We do support the bringing of ALJs into the process, but following the investigative stage, not before. Thank you.

[The prepared statement of Mr. Gilmer appears on p. 107.]

Mr. CLYBURN. Thank you, Mr. Gilmer. Before I go to the next person—Mr. Manhan is next. Before I get to you, may I ask you, Mr. Gilmer, whether or not you are objecting to having some informal resolution of a matter before an investigation?

Mr. GILMER. No, Mr. Chairman. In fact, what I'm proposing is that the process would start with the informal resolution stage, just as it is provided for in the bill and is provided for in the current EEO process.

What I object to or what we are concerned about is under the current law, in title 5, if you put an ALJ into that informal process, you formalize it. Now a person has to get legal advice about how to get witnesses, how to file pleadings before the ALJ in an ALJ proceeding.

These proceedings are conducted on the record without evidence unless this person is sufficiently sophisticated to go get that evidence. That's my concern, not that there would be an informal process.

Mr. CLYBURN. Well, it sounds like then you would agree with the Secretary's fears then. His expression seemed to be that he would much rather all of this stay within the agency with EEO counselors and that sort of thing and, if we were going to ever get to anything as formal as this, then it would then step outside the agency.

Mr. GILMER. We see that as somewhat different than we heard the Secretary expressing this morning. We do see a place for ALJs in this process, but we see them after the investigation where the evidence for the individual is developed.

We don't see them making what are generally considered administrative decisions, and we see the person being able to go to the ALJ before they have to go to the Federal courts. So inside the system they would have access to the ALJs, but only after the investigation.

Mr. CLYBURN. Well, let me reserve then until we hear the others, because I do have some problems. I have a couple more questions for you, but—Mr. Manhan.

**STATEMENT OF BOB MANHAN**

Mr. MANHAN. Thank you very much, Mr. Chairman. It's always a pleasure for the VFW to appear before this committee. Generally speaking, the VFW does support bill H.R. 1032, the Department of Veterans Affairs Employment Discrimination Act.

We like the idea of having an independent EEO within the organization. If we have any concern, it revolves around the creation of the administrative law judges, the ALJs. As we interpreted the chairman's floor statement when he introduced the bill, it appears to the VFW that the bill is establishing a new level of investigators in the EEO hearing cycle.

We would prefer to have the VA's EEO chain of command pretty much parallel what other major Federal departments and agencies have, keeping lawyers to an absolute minimum. We do like the idea that it is possible for a complainant at different stages, even after introducing a formal complaint, to then resolve the difference informally.

We believe with the ALJs involved, we may not have that flexibility. As I say, that's our perception of the floor statement that introduced the bill. It appeared on page E403 of the February 23, 1993, issue of the Congressional Record.

This concludes our summary of testimony. Thank you, Mr. Chairman.

[The prepared statement of Mr. Manhan appears on p. 111.]

Mr. CLYBURN. Thank you, Mr. Manhan.

Ms. Kingsbury.

**STATEMENT OF NANCY R. KINGSBURY**

Ms. KINGSBURY. Thank you, Mr. Chairman. I have submitted a statement for the record which is somewhat longer than what I'll comment on here this morning.

Our involvement in this began with a study that we recently started for Mr. Evans' subcommittee to identify the factors that discourage employees at VA's medical centers from filing sexual harassment complaints. We did that primarily by looking at closed cases from a couple of years ago to see what those records showed us about how these cases were handled.

The complaints we examined were filed, investigated, and resolved under a generally decentralized system, described earlier this morning, which vested the responsibility for dealing with these complaints with the directors of the 171 medical centers. As has been pointed out, counseling and investigations were done by employees who were assigned on a part-time basis for relatively short periods of time, and there has been a lot of turnover in those positions.

Our review found, among other things, that a third of the complaints were rejected on procedural grounds. In an area like sexual harassment, which may or may not take the form of actual discrimination, to reject complaints out of hand on procedural grounds seems to be a little bit too harsh.

We also found that complaints which were accepted, in many cases, were not investigated for many months. This left the com-

plainant in the situation of continuing to try to work in this hostile environment while nothing seemed to have been done.

About half of the complainants in the cases we examined either said that there were personnel actions or other kinds of actions which were specifically threatened as reprisals or they perceived that reprisal was likely.

In our view, the procedures for complaint processing didn't have the independence and oversight that this kind of a process really needs to have. The cases we examined also suggested everybody involved in the system, from the counselors and investigators to the deciding officials to the complainants themselves, needed additional information and training to make the system work the way it was supposed to.

As the Secretary has said, since his appointment in January, he has taken several steps to resolve some of these problems. He has established new procedures and ordered training and although I think these are significant steps, it will take time to assess their impact. Also concerns remain in our minds about the timeliness of complaint resolution and the qualifications and availability of VA's counselors and investigators.

Your bill goes considerably further in trying to resolve these problems, and we can get into the specifics of that if you like. In concluding my testimony, however, I'd like to offer the observation that successfully dealing with sexual harassment in any agency will take more than legislation. It is also vitally important for management to make it clear that it will not tolerate such behavior and to back this up by effectively dealing with employees who engage in such practices.

Based on my recent meeting with the Secretary, I believe he has made a commitment to try to do that, and I think it will be important to look again after a period of time to see if he has been successful.

Thank you very much, Mr. Chairman. I'll be happy to answer your questions.

[The prepared statement of Ms. Kingsbury appears on p. 113.]

Mr. CLYBURN. Thank you, Ms. Kingsbury. I'm pleased to hear that your meetings have led you to the conclusion that the Secretary is in fact responding favorably, and I think that most of us will agree that the steps taken thus far are laudable. However, if I may, let me go back to Mr. Gilmer, and then I may come back to you with a question or two.

Mr. Gilmer, you've expressed concern about the administrative law judge making the determination that we should not go forward with an investigation in a particular matter.

Mr. GILMER. That's correct.

Mr. CLYBURN. If the process will not allow for that, who would you suggest within the system, within the VA, be given that responsibility to determine whether or not a matter should go forward?

Mr. GILMER. Well, we're treading somewhat new ground here. So I'm not certain exactly what should happen in the VA. Other Federal agencies provide for an administrator above the department that's being investigated to make administrative decisions about that and to look at what kind of resolution should be offered.

In other words, the parties who have direct involvement aren't usually involved in the question as to whether the investigation should go forward or whether or not a resolution should be offered. For example, if we have a medical center that's being investigated, then the people at the regional level would be involved in deciding should this go forward or should the complainant be offered a resolution.

Of course, if that doesn't happen under current processes, I believe that the EEO rules changed in October allowing for the EEO to conduct a hearing by an administrative judge.

We don't see it being done by the General Counsel's office. The General Counsel's office has been involved in these decisions for a long time, and it certainly hasn't been very helpful up to this date.

Mr. CLYBURN. Well, Mr. Gilmer, I guess my concern is here that, as I understand this bill and from my own years of experience in these matters, it would seem to me that this would be the most appropriate time for an administrative law judge to come in and review the matter in order to determine whether or not the fact finding situation has been sufficient, whether or not the facts gathered do or do not square with the law, and to make some decision right at this point, and that decision would then conclude the agency's administrative process.

You would then step outside the agency or employee or whoever would want to appeal, they could go directly. You save a lot of time, and it seems to me you would get the employee into the independent process quicker.

Mr. GILMER. Mr. Chairman, we understand that's the intent of this bill. The only point that we are making is a technical legal point. We don't oppose the introduction of a more independent party. We're just asking the question, can an ALJ under the title 5 restrictions do this?

We're telling you that our reading of title 5, United States Code, says administrative law judges don't do this. Administrative law judges hold hearings on the record. That's what they do. That's all they do, and they make decisions based on that hearing record.

So what that means now is the party who has brought the complaint forward has to be able to make an argument and set forth a record before that administrative law judge before the investigation that would produce evidence that would allow them to make their case. We're saying that, for that party to be able to do that under the title 5 procedures, they are probably going to require legal counsel.

We're suggesting there's a problem in introducing that formal a legalistic process that early in what should be an informal EEO process. That's our concern. We do believe that with changes to title 5, that may be able to be corrected.

Mr. CLYBURN. Well, I appreciate your concern. I'm not too sure that we need to go as far as changing title 5. I think that we—with express language here, it seems to me even what we're doing with this legislation is adding some responsibility to administrative law judges that may not be there in title 5, to begin with.

If we make that explicitly clear here, I don't know that we need to go over trying to redo title 5 for the rest of the world, but I understand your concerns. It's just that I don't think we agree that

the same boogerman is there that you seem to see, but let me get back to Ms. Kingsbury, if I may.

Before that, Mr. Manhan, am I to understand that—I've looked at your statement, and I remember from your—I don't know if it was your most recent but most recent that I've encountered. You have a very unique way of summarizing statements, and thank you so much.

I can't tell whether or not you're supporting this or not. Maybe I missed something.

Mr. MANHAN. No, I don't think you've missed anything, Mr. Chairman. We feel strongly about it both ways.

Mr. CLYBURN. I've often been told you can't have it both ways. So go ahead.

Mr. MANHAN. I did say, seriously, it is a technical bill, and the legislative staff at the VFW is not that qualified on title 5, particularly the specific authorities and duties of an administrative law judge. As I read and reread the floor statement that Chairman Montgomery provided I believe I probably misunderstood the thrust of everything ALJs were to do.

I thought this bill was creating a new layer of review and a new entity whereby, ALJs do the investigating both formally and informally. Then they hear their own case. Then they render a decision, and they're part perhaps of an appellate process. I thought, this is really not resolving the problem. It's the same people reviewing their own work.

Therefore, if the VFW had any we had any reservations, it was only the role of the ALJ. Our primary concern is that as a core of new very qualified technical lawyers they might become an entity unto themselves and perhaps find problems where problems don't exist.

However, I've certainly learned a lot about who and what ALJs do, just attending this hearing Mr. Chairman.

Mr. CLYBURN. Oh, yes, you have. Thank you so much. We'll be pleased to work with you to make sure that we lay any—see if we can get you on one side or the other here.

Mr. MANHAN. Thank you, sir.

Mr. CLYBURN. Ms. Kingsbury, I looked at your statement. I found it very, very thorough. You've documented some things. Do you have the same fears Mr. Gilmer has about the point at which the ALJ was to step into this?

Ms. KINGSBURY. To be honest, Mr. Chairman, we didn't actually look from a legal perspective at the question of the role of the ALJs in this bill. We were focusing more on looking at the cases. So I can't comment on that specifically.

I would say, however, that if you look around at the operation of the administrative law process in the Federal Government, there is a broader concern that you might want to at least keep an eye on, and that has to do with the tendency to over-bureaucratize an administrative law process to a point where the already rather lengthy time it takes to resolve these matters might get worse.

I appreciate what you're trying to do with the independence side of it. I think that's meritorious, and certainly the history in this agency would suggest there's a lot that can be done to improve

that. But the tendency when you create one of these strict administrative law processes is that you get more than you bargained for.

I think that you might want to consider that point of view as this bill proceeds.

Mr. CLYBURN. That's a concern I have, and that's exactly why I asked the question, because it seems to me, if we were to follow Mr. Gilmer's line of reasoning here, it would say that just before determining whether or not a situation should go to an investigation after the informal process, we would then jump all the way to the regional office or the national office or somewhere for some determination. Lord knows how much time that will take.

Then after that determination is made, it would then come back to the agency to then start its trek into a formal process.

Ms. KINGSBURY. Well, I don't think that's quite the way I would understand it. There seem to be two decisions contemplated here. One is the decision on the case itself after the investigation and after we know what's gone on, and an administrative law judge or some other judicial, quasi-judicial type role might be appropriate at that point. On the other hand, the decision about launching an investigation, it seems to me, would be an appropriate role for this office of complaint processing. That office is where the investigators would in fact be working.

I assume there would be some kind of a regional structure, but it wouldn't be within the medical center, and it doesn't strike me as an overly complicated thing to do. The decision would be more independently of the medical center and the investigation presumably would be carried out by the people who work in the complaint processing office—in their own little regional structure, perhaps—but in that office.

I think that's workable without involving an administrative law judge at that point in the process.

Mr. CLYBURN. Would you think, Ms. Kingsbury, that if in one of these cases—You've got to do something to make a determination as to whether or not a full fledged, formal investigation will take place. Somebody has to do something.

Ms. KINGSBURY. Yes, sir.

Mr. CLYBURN. You've got to get information. You've got to try to verify what's been said. That, in and of itself, is somewhat of an investigation.

Ms. KINGSBURY. Well, I think it depends a little bit on how the details of the implementation of this actually get carried out. I could hypothesize that an informal complaint resolution structure would be—could be—established at the installation level, and that at the point a formal complaint is simply written down on a piece of paper, somebody in another office would look at just what's there and say, yes, this warrants investigation, and be able to do that straightforwardly.

Mr. CLYBURN. What happens then if that group or that entity were to deny it?

Ms. KINGSBURY. You could provide an administrative appeal process to the director of the office or someplace else.

Mr. CLYBURN. Then wouldn't that start another process that would take us down some months or years in order to determine

whether or not an investigation should take place, and then it would come all the way back for the investigation to start?

Ms. KINGSBURY. Well, I think if you got into that kind of thing, it could, yes, sir; but it seems to me that if you set this system up properly, the criteria for accepting or rejecting investigations would be clearly specified.

In all fairness to the General Counsel's office, the cases that we examined, included six that had been denied at the local level. But because the General Counsel's office felt they should be investigated, they ultimately were.

Mr. CLYBURN. Could you tell us how long that took?

Ms. KINGSBURY. Longer than it should have taken. I think you're right about that. I think the potential for long periods of complaint processing is in either system. I mean, it's in the current system. It's in the system that's proposed by this bill.

The only questions, as I understand them, are whether or not an ALJ needs to be involved and whether involvement would represent some kind of a conflict. Frankly, we haven't looked at that from the GAO perspective.

Mr. CLYBURN. Well, thank you. Mr. Gilmer, I see a question on your forehead.

Mr. GILMER. Well, the only point I would make is that, as we're looking at these processes, we currently do these things in Federal agencies. For 5 years what I did was handle EEO cases in the State of Colorado for the Department of Disabled American Veterans. I represented some 300 complaints, very few of them in the VA system.

Those I had in the VA system were handled atrociously. Most of the complainants were in the Postal Service, and maybe because they handled so many, they tended to handle them much better, and we did come to resolution of those complaints about 85 percent of the time.

We knew that the complainant went as far as they wanted to go, and we resolved it at that level. In most cases, though, complainants don't have representatives and they don't understand how to proceed.

The more formal the process gets early on, the less evidence is developed for the individual in the process. The ability for them to develop that evidence or to know how to go about it is limited. That means they're generally going to have to get legal counsel.

If you put the ALJs, as they are currently defined in title 5, United States Code, in that process you put in a formal hearing process to make the decision as to whether to investigate. Now, the person has to find an attorney to obtain advice on how to get their EEO case handled. We think that's too early in the process.

Ms. KINGSBURY. On a slightly different subject, Mr. Chairman, I would like to comment on Mr. Evans' earlier question to the Secretary about the coverage of VA employees under the Whistleblower Protection Act.

Mr. CLYBURN. Yes, ma'am.

Ms. KINGSBURY. Just for the record and for this committee's information, I will be testifying tomorrow before another committee of the House, specifically raising the question of whether or not the Whistleblower Protection Act should be extended to employees



not now covered, the second largest number of which are VA employees.

Mr. CLYBURN. I understand from counsel that we will be marking up legislation real soon on that subject, and it's good to hear that you all are in agreement at least on that one.

I will be looking forward to seeing Mr. Manhan's statement on that one. I really like the way you write. Thank you.

Well, thank you, Ms. Davis, Mr. Gilmer, Mr. Manhan, Ms. Kingsbury. Thank you so much for your testimony.

This hearing is now adjourned. Thank you.

[Whereupon, at 11:55 a.m., the committee was adjourned.]



## A P P E N D I X

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103<sup>D</sup> CONGRESS  
1ST SESSION

# H. R. 1032

To amend title 38, United States Code, to provide for improved and expedited procedures for resolving complaints of unlawful employment discrimination arising within the Department of Veterans Affairs.

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### IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 23, 1993

Mr. MONTGOMERY (for himself, Mr. STUMP, Mr. EDWARDS of California, Mr. SMITH of New Jersey, Mr. APPELATE, Mr. BILIRAKIS, Mr. EVANS, Mr. QUINN, Mr. PENNY, Mr. ROWLAND, Mr. SLATTERY, Mr. KENNEDY, Mr. SANGMEISTER, Ms. LONG, Mr. EDWARDS of Texas, Mr. CLEMENT, Mr. FILNER, Mr. GUTIERREZ, Mr. BAESLER, Mr. BISHOP, Mr. CLYBURN, Mr. KREIDLER, Ms. BROWN of Florida, Mr. HEFNER, Mr. RICHARDSON, Mr. STENHOLM, Mr. PAYNE of Virginia, Mr. PARKER, and Mr. OLVER) introduced the following bill; which was referred to the Committee on Veterans' Affairs

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## A BILL

To amend title 38, United States Code, to provide for improved and expedited procedures for resolving complaints of unlawful employment discrimination arising within the Department of Veterans Affairs.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Department of Veter-  
5 ans Affairs Employment Discrimination Act".

1 **SEC. 2. DEPARTMENT OF VETERANS AFFAIRS EMPLOY-**  
2 **MENT DISCRIMINATION RESOLUTION PROCE-**  
3 **DURES.**

4 (a) IN GENERAL.—Title 38, United States Code, is  
5 amended by inserting after chapter 7 the following new  
6 chapter:

7 **“CHAPTER 8—EMPLOYMENT**  
8 **DISCRIMINATION**

“Sec.

“801. Scope of chapter.

“802. Office of Employment Discrimination Complaints Resolution.

“803. Informal complaint resolution.

“804. Investigation of complaints.

“805. Final agency decision; hearings.

“806. Review of final agency decisions.

“807. Unlawful employment discrimination defined.

9 **“§ 801. Scope of chapter**

10 “(a) The procedures established in this chapter shall  
11 be implemented in a manner consistent with procedures  
12 applicable under regulations prescribed by the Equal Em-  
13 ployment Opportunity Commission.

14 “(b) Nothing in this chapter supersedes any right or  
15 obligation of an employee to elect (in lieu of procedures  
16 under this chapter) to raise an allegation of unlawful em-  
17 ployment discrimination under the appeal procedures of  
18 the Merit Systems Protection Board or under grievance  
19 procedures established under a collective bargaining agree-  
20 ment.

1 **“§ 802. Office of Employment Discrimination Com-**  
2 **plaints Resolution**

3 “(a)(1) There is in the Department an Office of Em-  
4 ployment Discrimination Complaints Resolution (herein-  
5 after in this chapter referred to as the ‘Office’), which  
6 shall be headed by a Director. The Director shall report  
7 only to the Secretary and Deputy Secretary.

8 “(2) Subject to the direction of the Secretary, the Di-  
9 rector shall have sole responsibility within the Department  
10 for administering the procedures under this chapter for  
11 resolving complaints of unlawful employment discrimina-  
12 tion arising within the Department.

13 “(3) In addition to the functions of the Director  
14 under paragraph (2), the Director shall perform such  
15 other functions as the Secretary may prescribe consistent  
16 with the functions of the Director under paragraph (2).

17 “(b) The Secretary shall employ within the Office ad-  
18 ministrative law judges appointed in accordance with sec-  
19 tion 3105 of title 5 for the purposes of this chapter and  
20 such other personnel as the Office may require.

21 “(c) The Secretary shall ensure that the Director is  
22 furnished sufficient resources to enable the Director to  
23 carry out the functions of the Office under this chapter  
24 in a timely manner.

1       “(d) The Secretary shall include in the documents  
2 submitted to Congress by the Secretary in support of the  
3 President’s budget for each fiscal year—

4               “(1) detailed information on the budget for the  
5 Office;

6               “(2) the Secretary’s opinion as to whether the  
7 resources (including the number of employees) pro-  
8 posed in the budget for that fiscal year are adequate  
9 to enable the Secretary to comply with statutory and  
10 regulatory deadlines for the administration of the  
11 procedures under this chapter and other provisions  
12 of law relating to the resolution of complaints of un-  
13 lawful employment discrimination involving the De-  
14 partment; and

15               “(3) a report on the activities of the Office dur-  
16 ing the preceding fiscal year, including (A) a state-  
17 ment of the number and nature of complaints of un-  
18 lawful employment discrimination received and the  
19 number and nature of complaints resolved, and the  
20 results of any appellate review, during the year, (B)  
21 a description of the timeliness of the resolution of  
22 complaints during the year, and (C) a statement of  
23 significant decisions and trends affecting the work of  
24 the Office.

25       “(e)(1) The Director shall prescribe—

1           “(A) standards of timeliness for the expeditious  
2 resolution of complaints of unlawful employment dis-  
3 crimination under this chapter;

4           “(B) the qualifications and training require-  
5 ments for employees of the Office; and

6           “(C) requirements for record-keeping pertaining  
7 to counseling and investigations by employees of the  
8 Office.

9           “(2) Regulations under paragraph (1) shall be con-  
10 sistent with regulations prescribed by the Equal Employ-  
11 ment Opportunity Commission, except that, in the interest  
12 of the expeditious resolution of complaints, the Director  
13 may prescribe shorter time periods with respect to any  
14 deadline or administrative period that is applicable only  
15 to the time within which the Government may (or is re-  
16 quired to) act.

17 **“§ 803. Informal complaint resolution**

18           “Employees of the Office shall counsel employees of  
19 the Department, and applicants for employment with the  
20 Department, who allege that they have been subject to un-  
21 lawful employment discrimination by an officer or em-  
22 ployee of the Department. The Office shall seek to resolve  
23 such complaints in an expeditious and impartial manner  
24 through informal investigation and conciliation using pro-  
25 cedures prescribed by the Director.

**1 § 804. Investigation of complaints**

2       “(a) If a complaint of unlawful employment discrimi-  
3 nation is filed with the Department and the complaint is  
4 not resolved through the informal resolution process under  
5 section 803 of this title, the Director shall assign the com-  
6 plaint to an administrative law judge, who shall determine  
7 whether the complaint shall be accepted for investigation.

8       “(b)(1) The administrative law judge assigned to a  
9 complaint shall make such determination in accordance  
10 with regulations of the Equal Employment Opportunity  
11 Commission, except that if the administrative law judge  
12 determines that the complaint is without merit, the admin-  
13 istrative law judge may determine that the complaint is  
14 not to be accepted for investigation.

15       “(2) A decision that a complaint is not to be accepted  
16 for investigation is a final agency decision of the matter.

17       “(c)(1) If the administrative law judge determines  
18 that the complaint is to be accepted, the Director shall  
19 promptly provide for an investigation of the complaint,  
20 which shall be carried out by employees of the Office (or  
21 by contract personnel acquired by the Director). The em-  
22 ployee (or contractor) conducting the investigation shall  
23 submit to the Director a complete written report of the  
24 results of the investigation.

25       “(2) If a portion of a complaint is accepted for inves-  
26 tigation and a portion is not accepted, the individual filing



1 the complaint or the Department may request the admin-  
2 istrative law judge to direct the suspension of the inves-  
3 tigation of the portion of the complaint accepted for inves-  
4 tigation pending the results of any review of the decision  
5 not to accept the other portion.

6 “(3) The Director shall furnish a copy of the inves-  
7 tigative report to the administrative law judge, the individ-  
8 ual who filed the complaint, and the individual whose ac-  
9 tions, or failure to act, gave rise to the complaint of unlaw-  
10 ful employment discrimination. The administrative law  
11 judge may direct that an additional investigation be made  
12 if the administrative law judge determines that an addi-  
13 tional investigation is warranted.

14 “(d) The Director shall prescribe standards for the  
15 conduct of investigations under this section.

16 **“§ 805. Final agency decision; hearings**

17 “(a) The final agency decision on a complaint of un-  
18 lawful unemployment discrimination, in a case not re-  
19 solved through informal procedures under section 803 of  
20 this title, shall be made by an administrative law judge.

21 “(b) The individual filing the complaint may request  
22 a hearing on the matter. Any such request shall be made  
23 in such time and manner as may be prescribed by the Di-  
24 rector. The administrative law judge shall grant a request  
25 for a hearing unless, after giving appropriate notice, the

1 administrative law judge determines that there is no genu-  
2 ine dispute as to a material fact.

3 “(c) In acting upon a complaint, an administrative  
4 law judge—

5 “(1) may conduct a hearing on the matter;

6 “(2) may refer the matter for a hearing by a  
7 hearing examiner; or

8 “(3) may decide the matter without a hearing.

9 “(d) If a hearing is held, the hearing shall be subject  
10 to section 556 of title 5.

11 **“§ 806. Review of final agency decisions**

12 “(a) If the final agency decision in a case complaining  
13 of unlawful employment discrimination by an officer or  
14 employee of the Department is adverse to the individual  
15 filing the complaint, the individual may appeal the deci-  
16 sion to the Equal Employment Opportunity Commission  
17 or to the appropriate United States district court, as pro-  
18 vided by law.

19 “(b) If the final agency decision in such a case is  
20 adverse to the Department, the Secretary may appeal the  
21 decision to the Equal Employment Opportunity Commis-  
22 sion. Any such appeal shall be made within 30 days after  
23 the date of the decision. The Equal Employment Oppor-  
24 tunity Commission may act on such an appeal in the same

1 manner as in the case of an appeal by an individual  
2 against a final agency decision.

3 **“§ 807. Unlawful employment discrimination defined**

4 “For purposes of this chapter, the term ‘unlawful em-  
5 ployment discrimination’ means any action, or failure to  
6 act, that is a violation of any of the following:

7 “(1) Title VII of the Civil Rights Act of 1964  
8 (42 U.S.C. 2000e et seq.).

9 “(2) The Age Discrimination in Employment  
10 Act of 1967 (29 U.S.C. 621 et seq.).

11 “(3) Section 6 of the Fair Labor Standards Act  
12 of 1938 (29 U.S.C. 206).

13 “(4) Section 501 of the Rehabilitation Act of  
14 1973 (29 U.S.C. 791).”

15 (b) CLERICAL AMENDMENT.—The tables of chapters  
16 at the beginning of title 38, United States Code, and at  
17 the beginning of part I of such title, are amended by in-  
18 serting after the item relating to chapter 7 the following  
19 new item:

“8. **Employment Discrimination** ..... **801”.**

20 **SEC. 3. TRANSITION.**

21 Chapter 8 of title 38, United States Code, as added  
22 by section 2, shall apply with respect to complaints of un-  
23 lawful employment discrimination that are filed after the  
24 end of the six-month period beginning on the date of the  
25 enactment of this Act. Any complaint filed before the end

1 of such period shall be resolved in accordance with the  
2 procedures in effect on the date of the enactment of this  
3 Act.

○

HON. G. V. (SONNY) MONTGOMERYH.R. 1032

Today's hearing is on H.R. 1032, the Department of Veterans Affairs Employment Discrimination Act. This bill addresses an issue which is vitally important to the nearly 260,000 men and women who work for the Department and the nation's veterans.

On behalf of the Committee, I want to welcome Secretary Brown to the hearing, it is his first official appearance as the Secretary of Veterans Affairs. You have appeared before the Committee on numerous occasions, Mr. Secretary, as an advocate for veterans and I am pleased you are here today as the Secretary for Veterans Affairs.

You have many important tasks ahead of you. Your service in the Armed Forces and your many years of leadership with the Disabled American Veterans will serve you well as you set out to accomplish those important tasks.

I applaud your recent actions to address the problem of sexual harassment in the VA. Increased employee sensitivity and better oversight of complaints processing are needed. But in this day and age, they may not be enough to solve the problem in VA or any workplace.

A number of VA employees came before our Subcommittee on Oversight and Investigations last year, and with a great deal of courage they told us about their experiences with sexual harassment. Despite being competent and skilled, several of these employees are still not able to return to work. Their perception, apparently shared by many other employees, is that VA doesn't take their complaints seriously.

There is a great deal of suspicion and distrust caused by too many years of apparent toleration of unacceptable behavior. The action which you and the Congress take must clear away that suspicion and distrust and restore confidence.

I hope you have been briefed on what has happened to the employees who testified before us last year. Their careers were seriously harmed by the behavior of some VA employees, and I think your intervention could speed up the resolution of their cases.

Victims of sexual harassment and other types of illegal discrimination deserve a sympathetic and effective response from their employer. The legislation before us today is absolutely essential to assure employees that mistreatment will be fairly dealt with. The current system of dealing with complaints is perceived to have conflicts of interest at every step and is viewed by employees with suspicion and distrust. In particular, complaints involving VA supervisors or managers present unavoidable conflicts of interests, and it is these conflicts of interest which this legislation attempts to resolve.

Finally, let me say that we are aware that government-wide changes in the EEO process are being considered by other committees in the Congress, and that changes have been under consideration for a number of years. H.R. 1111 and S. 404 are now pending in the House and Senate. In most respects, the aim of H.R. 1032 is similar to these bills. If a more comprehensive bill is reported by other committees, I intend to work with them to insure that the changes proposed in our bill do not conflict with that bill. But this committee should not wait to see whether other committees are going to act on a broader measure. The victims of sexual harassment deserve relief now. I want to hear the views of all the witnesses and move this bill forward as quickly as possible.

I wish to extend special recognition to the Chairman and former Ranking Minority Member of the Oversight and Investigations Subcommittee. Lane Evans and Mike Bilirakis held a very informative hearing last year which revealed most of the deficiencies which this legislation is intended to address. It was their work, and the work of the staff of that subcommittee, that led us to this hearing today, and I want to congratulate them.

Before recognizing Mr. Stump, I want to mention the other witnesses who will testify today. Bette Davis of the Nurses Organization of Veterans Affairs will follow Secretary Brown. Bette is President of NOVA, the Nurses Organization of Veterans Affairs and does a great job. Following Bette's testimony, we will hear from Len Gilmer who is the Associate National Employment Director for the Disabled American Veterans.

The Veterans of Foreign Wars will be represented by Bob Manhan who is the Assistant Director of the National Legislative Service.

Our last witness for the day will be Nancy Kingsbury from the General Accounting Office. Nancy is the recently appointed Director of Federal Human Resource Management Issues with the General Government Division.

VVA could not be here today, but a copy of their statement in support of this legislation is included in your folders.

## SUMMARY

## DEPARTMENT OF VETERANS AFFAIRS EMPLOYMENT DISCRIMINATION ACT

H.R. 1032**The bill would:**

- Establish an independent office in the Department of Veterans Affairs to handle all complaints of discrimination, including complaints of sexual harassment.
- Assign a permanent staff of trained EEO counselors to the new Office of Employment Discrimination Complaints Resolution (OEDCR) to assist in impartial and speedy resolution of informal complaints.
- Assign a permanent staff of trained investigators to OEDCR to investigate and prepare reports in cases where formal discrimination complaints are brought against the VA.
- Assign independent and unbiased administrative law judges to determine whether a complaint should be investigated, review the adequacy of investigations, conduct hearings, and make final decisions on complaints.
- Allow a review of the administrative law judge's final decision by the EEOC's Office of Federal Operations or, in the case of a decision adverse to an employee, by an appropriate federal district court.

**Effect of changes made by the bill:**

- Allows the key person in the informal complaints resolution procedure, the EEO counselor, to be an "honest broker" between aggrieved employees and managers.
  - Gives the EEO counselor independence from local managers.
  - Requires that the EEO counselor be trained prior to assignment.
  - Better supervision of counselors would help to remedy some of the shortcomings in record-keeping identified in a recent Inspector General review of EEO counselor performance.
  - Assignments of EEO counselors would be based on needs of employees at a particular facility.
- Provides that investigators will investigate formal complaints to which they are assigned as their sole function.
  - Current practice is to train employees to investigate complaints on an intermittent or "as needed" basis. These are employees assigned to regular duties in the VA who must take administrative leave from their current jobs to conduct investigations.
  - A cadre of full-time employees who are trained professionals should make the process fairer and more efficient.

- Assigns the Secretary's responsibility for agency decision-making to impartial administrative law judges.
  - Administrative law judges (ALJs) are widely used throughout the Federal government as impartial factfinders.
  - They would be required to have the same substantive expertise in employment discrimination law as agency attorneys who now prepare the Secretary's final decision.
  - ALJs are protected from pressure from agency officials by statutory provisions administered by OPM concerning their hiring, salary, and tenure.
- With one exception, works with existing laws and regulations governing the handling of complaints of discrimination by government employees.
  - The exception is a change to the current procedure whereby an employee who files a formal discrimination complaint has a right to request a hearing by an administrative law judge assigned by the EEOC. The bill requires the mandatory use of agency ALJs throughout the decision-making process, including all hearings. This is intended to assure agency impartiality and also to increase agency responsibility for the entire discrimination complaint resolution process, which is often delayed to the detriment of complainants and management officials.



STATEMENT OF HONORABLE BOB STUMP  
HEARING ON H.R. 1032  
MARCH 30, 1993

THANK YOU, MR. CHAIRMAN. I AM PLEASED TO JOIN YOU IN WELCOMING SECRETARY BROWN AND OUR PANEL OF WITNESSES FOR THIS MORNING'S HEARING ON H.R. 1032.

AS A COSPONSOR OF THIS BILL TO OVERHAUL THE VA'S EEO PROCESS, I OF COURSE SUPPORT ITS AIMS. BUT IF IT CAN BE IMPROVED, SO MUCH THE BETTER. THAT'S WHY WE ARE HERE, AND I AM MOST ANXIOUS TO LEARN MORE ABOUT THE VIEWS OF OUR WITNESSES ON THIS IMPORTANT TOPIC.

ALSO, MR. CHAIRMAN, I WANT TO COMMEND SECRETARY BROWN ON HIS AGGRESSIVE ACTIONS TO DEAL WITH SEXUAL HARASSMENT PROBLEMS AT THE VA. HE HAS EMPHASIZED AS A MATTER OF POLICY THAT VA WON'T TOLERATE SUCH INAPPROPRIATE CONDUCT AND THAT IT IS TAKEN SERIOUSLY.

WE MAY HAVE SOME DIFFERENCES OVER THE BEST APPROACH TO THESE PROBLEMS, BUT I AM CONFIDENT THAT, GIVEN THE LEVEL OF COMMITMENT TO ADDRESSING THEM, OUR APPROACH WILL BE CONTINUED COOPERATION AND FOLLOW-UP UNTIL THEY ARE LICKED.

THANK YOU, MR. CHAIRMAN.

STATEMENT OF CONGRESSMAN LANE EVANS  
ON  
H.R. 1032, DVA EMPLOYMENT DISCRIMINATION ACT  
MARCH 30, 1993

Last September, the Subcommittee on Oversight and Investigations, which I chair, conducted the Committee's first hearing on sexual harassment in the VA workplace. As a result of the courageous testimony presented by several VA employees, including victims of sexual harassment in the workplace, we learned about the many problems facing employees who seek a safe work environment and barring that, the fair and impartial resolution of informal and formal complaints of sexual harassment encountered in the VA workplace.

Since the Subcommittee on Oversight and Investigations does not have legislative authority, I am pleased that Chairman Montgomery introduced legislation to address many of the serious problems that were addressed last year.

As a cosponsor of this legislation, H.R. 1032, I strongly encourage and support prompt Committee approval of this measure and subsequent quick approval by the House. Sexual harassment cannot and should not be tolerated. VA employees, as well as all employees, are entitled to a safe, non-threatening, non-hostile work environment and to the prompt, fair and unbiased resolution of complaints of employment discrimination, including sexual harassment.

The Department's estimated cost of this legislation is obviously inflated and I urge the Members of the Committee to consider the very real costs of failing to address the problems which exist today. If the Committee fails to take action:

- \* How much more will VA "spend" on employee absenteeism resulting directly from workplace sexual harassment?
- \* How much will VA be forced to spend to recruit and train new employees to replace those who have quit because they faced a hostile VA work environment?
- \* How much more will VA pay in workers' compensation benefits to highly qualified employees who are no longer able to work because of the sexual harassment they were subjected to in the VA workplace?

The cost of H.R. 1032 is, in fact, small compared to the costs VA will incur if the Committee fails to take action.

Mary Cavanaugh  
P.O. BOX 21  
Lyons, NJ 07939

TESTIMONY

My name is Mary Cavanaugh. I have been employed at the Lyons VA Medical Center for the past five years. A little over a year ago I was reassigned from my job in ~~the~~ Director's office to Nursing Service as an "Administrative Officer," a job I neither applied for, nor wanted.

I believe I was reassigned as an act of retaliation for the testimony I gave in an EEO investigation concerning the sexual harassment of my friend and coworker, Donna Grabarczyk.

I joined the Lyons VA Medical Center in 1987 after completing a Health Systems Specialist Training Program at the Denver VA Medical Center. Prior to that I had been in the Washington VA Medical Center as an Administrative resident, which was part of my requirement for completing a masters level university program in health care administration.

My position in the Director's Office at Lyons was that of a staff assistant, my job series was that of Health Systems Specialist, a series designed to gain exposure and experience in hospital operations. The career track for this job series is eventual entry into the Associate Directors Training Program.

My association with Ms. Grabarczyk is that of being part of an organizational unit within the Director's Office called Management and Evaluation. This

section consists of Quality Assurance, Utilization Review, and Public Affairs/Planning. Donna Grabarczyk had responsibility for hospital-wide quality assurance and I was responsible for public affairs, planning and various management studies and assignments. We both reported to the Director's Executive Assistant, Luke Metaxas.

Ms. Grabarczyk and I have a close collegial relationship, and although our job functions did not overlap, we often discussed patient care issues and related concerns that had impact on the hospital operations. We do see each other socially from time to time and in the past couple of years we had been sharing an office.

Since I have known her, Ms. Grabarczyk has impressed me with her professionalism, integrity and dedication to her job and her employer. She has always struck me as being exceedingly level-headed and even-tempered in her dealings with both employees and patients.

It came then as a surprise to me after returning from a vacation in August of 1990, to find her quite distraught. She told me of the sexual harassment she experienced while I was gone, but what distressed her more was the Director's seemingly cavalier attitude towards the perpetrator, and the insensitivity he showed regarding her feelings about having to be in the same meetings with the man.

She attended an informal meeting with the Chief of Personnel; the Executive Assistant; and the perpetrator, Chief of Fiscal Service. At that meeting

the Chief of Fiscal offered a perfunctory apology to Ms. Grabarczyk at the request of the Personnel Chief. There was no indication given by the Director that he would be disciplined in any way.

Frustrated by this "boys will be boys" attitude, Ms. Grabarczyk filed a sexual harassment charge against the Chief of Fiscal, Mr. C. W. Lewis, and this is when her troubles truly began.

I was at first neutral, thinking that the Director had just made an error in judgement in underestimating how terribly degrading sexual harassment is towards women; but then I learned that Ms. Grabarczyk was only one of a multitude of women who had been sexually intimidated by this man. At the time Ms. Grabarczyk filed her complaint, two other women came forth with similar charges. One was talked out of filing, and a settlement was made to the other in exchange for a "gag."

An "administrative investigation" was called to question other alleged victims of this man, and a sexual harassment education campaign began in what appeared to me to be a cynical attempt to deceive employees into thinking Management was "taking care of the problem."

In fact the Director had made it very clear to Ms. Grabarczyk that he considered her EEO compliant to be a personal attack on him, and still nothing had been done to the Chief of Fiscal Service.

In October of 1990, Ms Grabarczyk discovered that her desk had been broken into, and the contents of her drawers disrupted. She called the Security

Chief at Lyons who brought the matter to the U.S. Attorney's Office. An F.B.I. investigation followed and a Grand Jury was convened, but after two years there has still been no resolution.

As Ms. Grabarczyk began suffering reprisals I began to understand that this had turned purely into a vendetta against her, and there never was any intention of solving the problem of sexual harassment. As her friend and supporter, I eventually began to receive reprisals. This included being harassed about taking leave for Christmas, being excluded from morning reports, and being given a memo from the Director's Executive Assistant stating that anytime I left the building I would have to inform him of where I was going, what I was doing, where I could be reached, and how long I would be away.

On May 23, 1991 I testified before an EEO Investigation about the reprisals against Ms. Grabarczyk. On July 8, 1991 at 1:00 PM I was called into the Director's Office. Both the Director and the Chief of Personnel were present. The Director handed me a memo stating that I would be reporting to Nursing Service as an Administrative Officer effective July 14, 1991. Although my salary remained unchanged, my job series would change from GS-671 to GS-341. I was told the basis for this reassignment involved "budgetary and efficiency considerations." I was told categorically that I was not to participate in any of my previous functions, and I was taken off all hospital committees. I was also informed that I would not be attending a training conference I had already been scheduled to attend.

On July 12, 1991 I requested in writing that my job series be maintained as it would be difficult to advance in the system without it. The Director turned down the request.

To me, the reassignment to Nursing was nothing but pure revenge for my testifying on behalf of Donna Grabarczyk. The position of "Administrative Officer" was just invented to satisfy the Director's inclination to be rid of me. The position was never advertised because it did not exist, and although the title might suggest a parallel scope of responsibility, it is in fact, a thinly disguised version of a former position in Nursing that might best be described as high-level secretary, occupied by a former ward secretary.

"Budgetary considerations" appear to have little to do with my reassignment considering that my salary was not reduced. Also, two new positions have been added to the Director/Chief of Staff's Office since then. In addition, if the Director was truly interested in efficiency, he would have reassigned his Executive Assistant, who has none of the educational, training, or experience requirements necessary to qualify as a Health Systems Specialist, as he is euphemistically called.

At this time, my performance appraisal was due. My boss, Luke Metaxas lowered my rating from highly to fully successful. I appealed the rating and it was raised again to highly but I was the only one in that category from the Director's Office who did not receive a bonus award for my performance. Months later I received a phone call from someone to whom I applied for a job. He told me that I should be aware that my Performance Appraisal was not in my Personnel Folder. When I checked with Personnel this was verified. Within a few days a xerox copy of my appraisal mysteriously appeared without the corresponding log entry of who put it in or when.



Since I needed a current supervisor's rating in addition to my performance appraisal in order to apply for other jobs in the system, I requested one from Luke Metaxas. He again lowered my ratings in certain categories. He additionally added a postscript that I had been "transferred to Nursing Service effective July 14." To me this was nothing but a cruel and unnecessary statement intended to alert potential employers that there was something wrong with me. Through Personnel Service I arbitrated to have the statement removed.

At the time Mr. Metaxas was doing my supervisory rating, I inadvertently discovered that he requested through our Personnel Service a copy of my previous supervisor's rating from Central Office. I wrote a memo to the Chief of Personnel expressing my shock and anger at this blatant violation of the Privacy Act, and requested that it be returned to me immediately. I received no response, nor was I given a copy back.

I have been asked by various people why I have never filed an EEO complaint. My response to that is that it is clear to me that the EEO process does not work, that it has in fact worked against me. All I could expect to gain from filing a complaint is continued reprisal.

I am appalled and disgusted by the obvious manipulation of EEO by top management in a charade of "due process" for the unwary employee.

I continue to see the most profound violations to Ms. Grabarczyk's professional life sloughed off as "nothing substantial" by a succession of all male EEO investigators who dance to the strings pulled by the status quo.

I am disillusioned at a system that would allow thousands of taxpayer dollars to be spent in a frenzy of retribution, as opposed to solving a problem. For the time and resources spent in one man's vendetta against a woman who's only crime was to ask to be left alone is to wonder: where is the leadership, compassion and wisdom to guide the care of sick and needy patients?

Mr. Lewis was afforded the exquisite luxury of being permitted to stay at Lyons for almost a year after committing what I consider sexual battery, then was ushered into a cushy "disability" retirement. I on the other hand, had my career sabotaged in a month-and-a-half for answering to an ethical responsibility. Ms. Grabarczyk has had her career sabotaged for taking a stand against sexual degradation.

The message from Lyons VA is loud and clear: women who do not toe the patriarchal line, are dealt with swiftly and harshly; men who commit almost any infraction will continue to be protected by the brotherhood.

TO: The Honorable Lane Evans, Chairman, and  
Members, Subcommittee on Oversight and Investigations

SUBJECT: Statement of Donna Grabarczyk for Hearing on 9/17/92

Thank you for inviting me to testify at this hearing. The following is a summary of my personal experience of sexual harassment in the VA workplace.

I am employed full time at the Veterans' Affairs Medical Center, Lyons, New Jersey. My title, effective Feb. 12, 1992, is Quality Assurance Coordinator. I am at Senior Grade (12), Step 10.

My career with the Department of Veterans' Affairs began in April 1974, when I became a staff nurse at Lyons VA Medical Center. As listed below, my career at Lyons has been one of consistently high performance evaluations and advancements to increasing levels of responsibility.

1974	Staff Nurse - Full Grade
1976	Assignment to Head Nurse position
1977	Assignment as Clinical Coordinator (Supervisor)
1977	Promotion to Intermediate Grade
1979	Special Advancement for Performance
1981	Special Advancement for Performance
1982	Promotion to Senior Grade
1982	Assignment as Quality Assurance Coordinator/Nursing
1983	Special Advancement for Performance
1984	Special Contribution Award
1984	Special Advancement for Achievement
1985	Assignment as Quality Assurance Coordinator/Medical Center
1987	Superior Performance Award
1988	Assignment as Quality Assurance/Risk Management Coordinator/Medical Center
1989	Superior Performance Award.

During my assignment as Quality Assurance/Risk Management Coordinator for the Medical Center, I also served as Acting Executive Assistant to the Director for several months on three occasions.

Since June 1, 1992, I have been "detailed" "until further notice" to Nursing Service. The scope of my duties is limited to assisting the nursing staff on Long Term Care units in preparing for the next accreditation survey by the Joint Commission on the Accreditation of Healthcare Organizations.

The incident of sexual harassment, which I reported, occurred on Wednesday, August 15, 1990. It was not the first time I had been harassed by the Chief, Fiscal Service, Mr. C. W. Lewis; but it was the most frightening. Since Mr. Lewis' transfer to Lyons in 1984, his behavior toward women had been horrible. With me, it started with his putting his arm around my shoulders. When I told him to "stop," he'd hug me harder, as if my resistance pleased him. Other employees saw this and at least one other woman had complained verbally to the Medical Center Director about Mr. Lewis' actions toward her. Mr. Lewis then started hugging me and kissing me on the neck. When I tried to pull away from him and told him, "Don't do that to me!", he seemed to enjoy my attempts to get away from him. I kept my distance, but he would come up behind me by surprise and pull me toward him.

I did not report these events. For him, they were his standard procedure with women. I thought that, as a mature woman, I could handle it by myself and tried to avoid him as much as possible.

On August 15, 1990, Mr. Lewis came into the Director's suite just as I was coming down the hall from the Director's office. It was a hot afternoon and the hall lights had been dimmed to reduce the use of electricity. He first stuck his tongue out at me in an obscene fashion. When I asked him why he thought he could do that, he continued walking toward me. He stopped and unexpectedly backed me against the wall of the corridor. I felt my back and head pressed against the wall. He kissed me on the mouth.

When I was able to speak, I told him, "That was sexual harassment...and I have witnesses." I pointed toward two men in white uniforms who started to come in the glass door to the hallway where we were standing. With that, Mr. Lewis put his face within 2-3 inches of mine and told me, "You liked it!" I said,

"No, I didn't" and walked quickly away from him to my office, closing the door.

I doubt I'll ever be able to forget this incident and the feelings of revulsion, violation, and helplessness I experienced following it. I immediately reported it to my supervisor, Mr. Luke Metaxas, Executive Assistant to the Director, in the presence of the Chief, Personnel Service, Mr. Ron McWold. I was too upset to remain on duty and Mr. Metaxas granted my request to leave work early.

Somehow, I made it home safely despite the tears streaming down my face. I showered and scrubbed my mouth fiercely, trying to remove the filth of what I had experienced. I felt ravished-- as if I were a rape victim. When my husband came home, he found me cowering in the corner of the bedroom in an old housedress, still unable to stop crying. I told him what had happened to me. We decided I should make a written report to the Medical Center Director the next morning.

I went to work the next day having had little sleep the previous night. I kept thinking, "How can I ever feel safe there now? What will he do to me next?" I gave the Director, Mr. Kidd, a written report of what had happened as soon as he came in. He did not seem surprised. I suspect that Mr. Metaxas had already informed him of the incident.

Mr. Kidd's reaction to my report was not at all what I expected. There was no effort to provide assistance, despite my obviously traumatized state. He expressed two concerns. His first concern was that Mr. Lewis' wife was also a service chief (Psychology Service), and secondly, whether I had told my husband and what my husband had said.

He asked me if I wanted him to confront Mr. Lewis. I said, "Yes," and he told me Mr. Lewis would tell the facts from his point of view. He also said this could get "messy," "dirty." I told him I already felt filthy.

When I gave Mr. Metaxas a copy of the report I had given to Mr. Kidd, he too wanted to know if I had told my husband and what he had said.

Neither my immediate supervisor, Mr. Metaxas, nor the next level of supervision, Mr. Kidd, expressed any insight or concern about me. There was no suggestion that I should seek medical care, that supportive counseling was available, or that I should go to Employee Health for care.

I closed and locked my office door, which was not my habit, stayed there all day except for trips to the ladies room and anxiously waited to hear from Mr. Kidd the result of his meeting with Mr. Lewis. Mr. Kidd came to my office late in the day. He told me that he had not met with Mr. Lewis himself, but that Mr. McWold had. He said Mr. McWold had told Mr. Lewis to "leave me alone." He went on to say Mr. Lewis could not be fired as his was a "centralized position."

During that conversation, Mr. Kidd told me: that Mr. Lewis would not hurt me; that they played golf together; that he (Mr. Lewis) had probably done this to other women; perhaps it was a "cultural" thing; that Mr. McWold was researching case law; I should tell my office mate, Mary Cavanaugh, not to invite Mr. Lewis into the office; did I think Mr. Lewis was trying to get back at me because of my meeting with him and his assistant chief on Aug. 13?; his former Executive Assistant had come to him about Mr. Lewis' behavior; and he would "get back to me the following week."

I told Mr. Kidd I would not keep myself locked in my office like a prisoner when I had done nothing wrong. I described to him how confused I was that someone with this behavior could remain a service chief. I asked him how the VA system could tolerate someone doing this to women.

On Friday, Mr. Metaxas asked how I was doing. I asked him if Mr. Lewis would still be attending the Director's staff meeting the next Tuesday, saying I hoped I would not have to see him there.

I had asked Mr. McWold for the names of the EEO counselors and met with a counselor the following Monday. There are four EEO counselors at Lyons for approximately 1600 employees. At that time, there was no external Employee Assistance Program. Anxiety,

sleeplessness, and the nausea and tremors I was experiencing were taking their toll on my physical state. The counselor, a member of the library staff, was the first person to suggest that I get medical help.

On Aug. 20, I went to Employee Health Service for help. The Employee Health Nurse arranged for me to see a Nurse Clinical Specialist in psychiatry. I met with this nurse and arranged to see her again. However, she met me for lunch the following day to tell me her supervisor, the Chief Nurse, told her that she did not "have the time" to see me. I was crushed and felt more and more alone.

Again I went to Employee Health, where the Employee Health Nurse referred me to a Social Worker on the Medical Center staff. I met with this Social Worker once. After our meeting, I realized that since the Nurse Specialist had betrayed my confidentiality to her Chief, the Social Worker might do the same. I felt so ashamed and did not want anyone to know what had happened to me.

Before I attended the Director's staff meeting, I saw Mr. Lewis go into the conference room and had to go into the bathroom before I went to pieces. I went to the meeting and gave a report and sat by the door so I could leave the meeting first; then I returned to my office.

I had told the EEO counselor and the Director that I felt Mr. Lewis should be removed from the hospital grounds so that women could come to work safely. Mr. Kidd had joked that maybe Mr. Lewis could work in an "all boys school." I told him I did not think that would work.

During the informal counseling session with the EEO counselor, Mr. McWold, Mr. Metaxas, and Mr. Lewis, Mr. Lewis admitted kissing me and apologized. Any communications between his office and mine were to be handled through intermediaries. I refused to be moved from my office as was suggested and said I'd give this arrangement a "try" as long as I did not have to see or hear Mr. Lewis.

For one week after that session, I came to work trembling and nauseated. I frequently heard Mr. Lewis' intentionally loud voice

outside my office window and door. My perception of this behavior was that he was flaunting the fact that he was still at the Medical Center. The sight of his car frightened me. I could not sleep or eat. I worried constantly that I would see him.

I filed a formal EEO complaint on Aug. 31, 1990.

On Sept. 12, 1990, Mr. Kidd called me to his office, ostensibly to discuss my request for compensatory time for extra hours I had worked in preparation for the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) survey during Labor Day week. He was very angry and said approving my request would make him "look bad" and that he was "disappointed" in me. After telling me I was an "honest, hard working employee who does a fine job," he said perhaps I was upset about the "other situation" and that he had received my formal EEO complaint.

He kept saying Mr. Lewis' behavior was an "isolated incident." I told him it was a behavior pattern and that his former Executive Assistant had complained of similar actions by Mr. Lewis. He said that was three years ago and no one had reported anything in writing. He said I could file a civil suit against Mr. Lewis. He asked if I knew that my formal complaint was actually against him as a manager. When I told him many women had told me of bad experiences with Mr. Lewis, he said he had a wife and daughters and that he could conduct an administrative investigation. He asked who I felt should conduct such an investigation. My recommendation was that that investigator be a woman, but had no name to suggest. He then began asking me the women's names, which he wrote as I gave them.

He said he wanted to "sit on this" (my formal complaint) for a while. When I asked about the effect of this delay on the timeliness of my formal EEO complaint, he assured me it would not make any difference. At my insistence, the investigation was to be completed by late September.

An investigation was conducted by Nancy Hague, a Personnel Specialist. Testimony was taken from 22 persons. Of these 22, 12 reported suffering or observing sexual harassment from Mr. Lewis.



Despite this finding, Mr. Lewis was not suspended and continued to perform his daily duties.

A formal EEO investigation was conducted in January 1991, five (5) months after my complaint was filed. Mr. Lewis continued to attend meetings at which I was present and moved freely about the Medical Center. The EEO investigator, Mr. John Boyd, recommended a finding of discrimination within the Sexual Harassment area.

I was notified on March 29, 1991, that Mr. Lewis was to receive a disciplinary action "of sufficient severity as to require that it be recorded in his personnel folder" and to be completed within a time "not to exceed 90 calendar days." This would be 11 months after the incident!

In this offer of "full relief," I was also informed that the VA would assist me in filing compensation claims for medical expenses. I had sought medical help in October 1990 and by this time had paid over \$1400 in medical bills. This was the first time I had been informed of this assistance. It was not until November 1991, over one year after medical treatment began and three months after submitting claims that I was reimbursed. Claim forms were repeatedly denied and returned unpaid despite my appeals to Personnel Service for assistance.

Before the investigation was concluded, I received the only written counseling of my career. It was from the Director and was for requesting compensatory time for the overtime hours I had worked. I was to provide a detailed hour by hour account of the duties I had performed during those hours. When I provided an hour by hour account, I received a second counseling memo requesting further information to justify compensatory time. My supervisor, Mr. Metaxas, also gave me a written memo re: observation of my response to the Director's memorandum.

During this time, I learned from the Chief, Social Work Service, Mrs. Richardson, that she had received a typewritten anonymous note slipped under her office door warning her to "keep out of EEO complaint by Donna Grabarczyk on C. W. Lewis." It was signed "A Friend."

My office door and desk were entered over a weekend. I reported the entry to the Medical Center police, who asked me if I would file a written complaint. After I filed the complaint, I was asked by the police if I would meet with the FBI agent who was on the station conducting an investigation.

I met with the FBI, then received a subpoena to appear as a witness at a Grand Jury hearing. I and several other employees testified before the Grand Jury. Those women who were sexually harassed were encouraged to think that something would be done about Mr. Lewis because of these events. We watched and waited anxiously to see him brought in on criminal charges, but nothing happened.

Two of the victims harassed by Mr. Lewis did not continue to pursue the EEO complaints they had filed against him. As part of the resolution of the complaint, one had to sign an agreement to keep "confidential" and not disclose the terms except to authorized EEO officials or other officials responsible for implementing the agreement.

Mr. Lewis never received disciplinary action. A notice of proposed removal was being appealed by him when he was generously awarded a disability retirement.

Relating the reprisals I have received over the past two years would take far more space than I am allowed in this statement. They include:

- Denial of leave requests and education
- Exclusion from meetings I had previously attended
- Reduction in duties
- Change in title and position description
- Lowering of performance evaluations
- Restrictions on how I performed my duties
- Detailing to Nursing Service
- Placement of newspaper ads for my job
- Moving my office out of the Director's suite into a basement with only a desk, phone, and broken chair.

These are just a few of the actions that have been taken to subtly and systematically destroy my professional career.

I filed EEO complaints for some of these retaliatory actions. My EEO counselor was not permitted to interview witnesses whose names I provided. EEO investigators did not contact persons whose names I provided in affidavits prior to formal investigations. Documents which I provided to investigators were not mentioned in the final report of investigation.

The proposed relief I was offered was additional reprisal--such as transfer to a Nursing Instructor position and removal of some of my duties. My complaints were not considered individually, but several were addressed at one time by the same investigator. I was told that I must accept the resolutions offered as a group and could not accept one without the others.

Mr. Joe Spencer Norris, the most recent investigator, advised me that I should just accept the fact that I was the scapegoat, "that's the system," and I should "give it up."

I can't believe that Mr. Norris's advice is in the best interest of the women throughout the VA who have been victims of sexual harassment. The VA's transfer of habitual harassers from station to station promotes their aberrant behavior. It also provides to the harasser an opportunity to continue illegal actions in a new climate among unsuspecting women. Stringent remedies are needed to modify this behavior. Rewarding harassers with disability retirements instead of removal sends out the message of a VA-wide practice of condoning this behavior.

There are many women who continue to "put up with it" and silently suffer unwelcome verbal and physical harassment. They fear the kind of punishment I have received over the past two years.

I have received tremendous support and concern from fellow employees during the past few weeks. They come to tell me I am in their prayers. Employees I've never met come to shake my hand and wish me luck. Their good wishes and the encouragement of family and friends have given me the strength to take a stand on this issue.

I am grateful that you have taken the time to examine this issue. I greatly appreciate your interest.

Respectfully yours,

*Donna Grabarczyk 9/5/92*

Donna Grabarczyk

STATEMENT OF CONGRESSMAN CHRISTOPHER H. SMITH  
COMMITTEE ON VETERANS' AFFAIRS  
MARCH 30, 1993

"Department of Veterans Affairs Employment Discrimination Act"

Thank you, Mr. Chairman, for calling today's hearing on this important legislation. I applaud your leadership in authoring H.R. 1032 and join you in welcoming the witnesses.

Mr. Chairman, last year's hearing conducted by the Oversight and Investigations Subcommittee focused our attention on the sexual harassment problem at the VA. I was particularly troubled to hear about the inexcusable events which occurred at the Lyons VA Medical Center in New Jersey. Not only have we received testimony that a high ranking hospital official sexually harassed staff members, but the VA's system for resolving the complaints failed miserably. If those incidents were not sufficiently repugnant, what can only be described as retaliation was subsequently taken against both the victim and witnesses. Mr. Chairman, these occurrences are intolerable. The bill under consideration this morning may be the answer.

As an original cosponsor of the Department of Veterans Affairs Employment Discrimination Act, I deeply regret that the VA is not supporting this measure. Although I am pleased to see that the Department is undertaking aggressive efforts to resolve sexual harassment complaints, I feel these efforts may be insufficient.

In my view, a structural problem exists in the VA's process for arbitrating sexual

harassment complaints. That process must be improved. The new, autonomous VA office established by this legislation would handle the resolution of any employment discrimination complaint. But the key aspect of this office is that the counselors will act independent of the local managers who may not be impartial in their review of sexual harassment complaints.

*I do have one suggestion, Mr. Chairman. The retaliation against witnesses -- as described in testimony from Lyon VAMC employees -- may need to be addressed. I would like pursue this matter with my colleagues and possibly offer an amendment concerning witness protection at the full Committee mark up on Thursday.*

Mr. Chairman, I look forward to hearing the testimony of our witnesses and hope that we may secure the swift enactment of this measure.

THE HONORABLE MICHAEL BILIRAKIS  
COMMITTEE ON VETERANS' AFFAIRS  
MARCH 30, 1993

THANK YOU, MR. CHAIRMAN.

FIRST, LET ME COMMEND YOU FOR SCHEDULING THIS HEARING ON H.R. 1032, THE DEPARTMENT OF VETERANS' AFFAIRS EMPLOYMENT DISCRIMINATION ACT. H.R. 1032 PROVIDES FOR IMPROVED PROCEDURES FOR RESOLVING EMPLOYMENT DISCRIMINATION COMPLAINTS, AND I AM PLEASED TO REPORT THAT I AM ORIGINAL COSPONSOR OF YOUR LEGISLATION.

THE DEPARTMENT OF VETERANS' AFFAIRS IS THE SECOND LARGEST FEDERAL AGENCY WITH APPROXIMATELY 260,000 EMPLOYEES. ADDITIONALLY, THE VA'S WORK FORCE INCLUDES A LARGE NUMBER OF WOMEN AND MINORITIES. GIVEN THIS DIVERSITY, IT IS IMPORTANT THAT ALL VA EMPLOYEES ARE TREATED FAIRLY AND WITH SENSITIVITY IN THE WORK PLACE.

DURING THE 102ND CONGRESS, THE OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE, ON WHICH I SERVED AS THE RANKING MINORITY MEMBER, HELD A HEARING ON SEXUAL HARASSMENT CHARGES AT THE VA. OUR HEARING REVEALED AMONG OTHER THINGS THAT THE PROCESS IN PLACE AT THE VA FOR INVESTIGATING SEXUAL HARASSMENT COMPLAINTS WAS SERIOUSLY FLAWED.

SEXUAL HARASSMENT IS A VERY SERIOUS MATTER. AS WE MOVE TOWARDS GREATER EQUITY IN THE WORK PLACE AND IN SOCIETY, SEXUAL HARASSMENT MUST BE CONFRONTED AND CONQUERED. EVERYONE HAS THE RIGHT TO LIVE AND GO TO WORK WITHOUT THE FEAR OF SEXUAL HARASSMENT.

WE OWE FEMALE VETERANS AND ALL FEMALE VA EMPLOYEES THE ASSURANCE THAT WE WILL NOT TOLERATE SEXUAL HARASSMENT AT ANY LEVEL AND WE WILL DO EVERYTHING WITHIN OUR POWER TO HELP CREATE AN ATMOSPHERE WHERE HUMAN BEINGS ARE RESPECTED FOR THEIR WORK AND CONTRIBUTIONS TO OUR SYSTEM. WE WILL TOLERATE NOTHING LESS.

I AM EAGER TO HEAR THE TESTIMONY OF TODAY'S WITNESSES. AS MEMBERS OF CONGRESS WITH OVERSIGHT AUTHORITY OVER VA PROGRAMS, WE MUST ENSURE THAT ALL DISCRIMINATION AND SEXUAL HARASSMENT COMPLAINTS FILED WITH THE VA ARE HANDLED IN AN APPROPRIATE AND EXPEDITIOUS MANNER.

THANK YOU MR. CHAIRMAN.



## Opening Statement

The Honorable James E. Clyburn

Committee on Veterans' Affairs

Full Committee Hearing

H.R. 1032

DVA Employment Discrimination Act

March 30, 1993

Mr. Chairman, Members of the Committee, I join your enthusiasm in addressing discrimination issues and concerns within the Department of Veterans' Affairs and thank you for holding a hearing on this important legislation in such a timely manner.

The Veterans' Administration has the unfortunate reputation of being a place where discrimination charges are ignored or not taken seriously, investigations are conducted in an unconcerned, haphazard manner, and review hearings are adjudicated in biased, prejudicial, proceedings.

While I applaud Secretary Brown's efforts to implement new guidelines and procedures for

addressing discrimination claims within the Department of Veterans' Affairs, I think there is a more serious issue which cannot be addressed by simply changing rules and guidelines. The success of any discrimination redress program depends almost entirely on two things - perception and trust. Although I am sure the new guidelines, sensitivity training, and workshops are well intentioned, employees simply do not believe their complaints will be heard and addressed in a timely and fair manner, if addressed at all.

While I am sure most of you know of my background as Commissioner of Human Affairs for the State of South Carolina, I know from eighteen years of experience, in administering employment discrimination laws, new rules and guidelines alone do little to improve employee or public confidence in discrimination proceedings and adjudications. Employees will not seek redress through a system which they believe is corrupt and nonresponsive.

Mr. Chairman and members of the Committee H.R. 1032 provides for a fresh start. Including in this legislation is the requirement for

permanent, trained EEO staff, and independent administrative law judges, which I believe will bring some much needed credibility to the Department of Veterans' affairs discrimination processes. I look forward to hearing the testimony of Secretary Brown and the other guests.

## PREPARED STATEMENT OF CONGRESSWOMAN WATERS

H.R. 1032, Department of Veterans Affairs Employment Discrimination Act

Good Morning. I am pleased to be here today to hear testimony on H.R. 1032, the Veterans Affairs Employment Discrimination Act.

We are all aware of the recent horror stories coming from VA, mostly dealing with sexual harassment and the inadequacies of the Department in dealing with such complaints.

Recognizing the VA is the second largest employer with the Federal agency, I think it is appropriate that we would take a look at how the agency might better enhance its EEO capabilities. Mr. Chairman, I applaud your leadership and guidance in drafting this legislation. It clearly points us in the right direction.

All people, regardless of race, sex, ethnic origin disability, age or creed have a basic right to be treated fairly and with dignity, whether it be in the workplace or whatever the setting. When we close our eyes to actions that go against this principle, we all suffer. I am interested in working with this committee to make sure that we do the very best that we can do to make sure that the civil rights of employees are not neglected. I am particularly interested in making sure that women and minorities do not become further victimized by a system that has by tradition ignored their needs and rights.

Mr. Secretary, I look forward to hearing our views on H.R. 1032 and the Department's plans for improving its EEO program. I welcome you all here and I look forward to receiving your testimony as well.

Thank you.

STATEMENT OF JESSE BROWN  
SECRETARY OF VETERANS AFFAIRS  
BEFORE THE  
COMMITTEE ON VETERANS AFFAIRS  
HOUSE OF REPRESENTATIVES  
March 30, 1993

Mr. Chairman and Members of the Committee:

It is with pleasure that I appear before you today to present the views of the Department of Veterans Affairs on H.R. 1032, a bill to provide for improved and expedited procedures for resolving complaints of unlawful employment discrimination arising within the Department of Veterans Affairs.

Let me begin by expressing my appreciation to you, Mr. Chairman for your commitment to protecting the integrity of the employment discrimination complaint process. Your bill demonstrates your commitment to protecting the integrity of all VA operations.

The bill would make a number of statutory changes designed to restructure our current procedures on discrimination complaints. These would include mandatory staffing provisions and complaint dismissal authority.

With regard to the specific content of the bill, I would like to share with you several major concerns. First, I believe that Federal employees should receive the same rights and treatment, regardless of the employing agency. I thus find it difficult to endorse a process which results in the VA and its employees being treated distinctly differently from the rest of the government. Second, I question whether this bill will eliminate the perception of unfairness which seems to be the driving force for changes to the current system. Because the Department will still be investigating itself, and since Department employees will still issue final agency decisions, the perception that the "fox is guarding the hen house" is likely to linger in the minds of our employees.

Finally, with respect to costs, we project the costs to VA of operating its EEO program with the changes required by H.R. 1032 to be 14.3 million dollars per year, a 61 percent increase over current costs.

As you may know, Mr. Chairman, the EEOC has taken an important step in reforming the government-wide complaint resolution process by issuing new regulations, effective last October. These regulations share your goals of providing fair hearings in a timely manner.

In addition to the EEOC's new regulations, I have taken a variety of steps within the Department to improve the processing of discrimination complaints. Many of our internal improvements focus on better processing of sexual harassment complaints. It is my goal to eliminate sexual harassment from the Department. I believe the time has come for the Department to be proactive, not reactive, in eradicating sexual harassment from our offices and facilities, and I appreciate this opportunity to review with you some of the initiatives undertaken at my direction and with my full support.

Eliminating sexual harassment has been a priority since I assumed stewardship of this Department. I immediately met with the Deputy Assistant Secretary for Equal Employment Opportunity to discuss my concern about sexual harassment issues and to direct that actions be taken to eliminate it throughout VA, then notified the White House of my review of the EEO program, with special attention to sexual harassment and gender discrimination. I sent Deputy Secretary Gober to Atlanta for an on-site review of sexual harassment allegations there. Based on my review of the EEO process, I suspended decentralized processing of discrimination complaints, and established a requirement for higher level review of all sexual harassment complaints. Specifically, OEO will assign

2.

investigators to these complaints, and Regional Directors or organizational heads will be notified whenever a sexual harassment complaint is filed, such that there are outside monitors for every allegation rather than asking facilities to investigate their own problems.

I promptly issued a department-wide letter regarding my expectation that all employees give the highest level of respect, courtesy, and support to one another and to those we serve. My follow-up letter to employees announced a requirement that all employees receive a minimum of four hours of training on preventing sexual harassment and the discrimination complaint process, with refresher training every two years. At this time, I established an 800-number to serve as an EEO information line, and activated a Work Group of senior staff to address sexual harassment and other gender-related issues.

Offices and administrations within VA have acted to eliminate sexual harassment as well. First and foremost, the Department has stepped up existing training efforts to ensure that all employees understand the behavioral standard expected of them, and to ensure that managers appreciate their duty to promote appropriate behavior by all employees. Departmental components are disseminating policy statements regarding zero tolerance for sexual harassment. These statements not only forbid sexual harassment, they identify specific words, gestures, and attitudes which may offend or intimidate, in an effort to increase sensitivity and understanding.

Many components of the Department have conducted extensive training within the last year and further educational efforts are ongoing. Several organizational units have established libraries of commercial videos and other instructional materials on preventing sexual harassment. We are aiming information at every level of understanding and responsibility and we will continue to do so until all VA employees understand appropriate demeanor and conduct.

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Concurrently, the Office of Equal Opportunity is amending procedures for EEO complaints which allege sexual harassment and is revising EEO Counselor training materials and EEO Investigator training materials to include a special section on handling sexual harassment complaints. In my second letter restating my commitment to eradicating sexual harassment, I sent every employee directions on revised discrimination/sexual harassment complaint procedures.

In addition to heightened awareness and improved mechanisms for curtailing problems, my commitment to affirmative action addresses the problem of sexual harassment as well as other discriminatory employment practices.

I've alluded to departmental efforts to eliminate sexual harassment. The attachments to my testimony detail the specific actions taken prior to my arrival and under my direction.

We are relegating past practices and problems to the VA history books with the lessons well learned, for we do not intend to repeat them. What VA does intend is to work its way toward being a model organization in eliminating discrimination and sexual harassment.

Given the steps that the Department has taken, and the need to provide VA employees the same rights as other Federal employees, the Department does not support H.R. 1032. We believe our changes should be given an opportunity to work and that EEO reform, if necessary, should be implemented government-wide and not on an agency-by-agency basis.

Mr. Chairman, this completes my testimony. Thank you for this opportunity to present our views.

SECRETARY BROWN MOVES  
TO ELIMINATE SEXUAL HARASSMENT  
IN THE DEPARTMENT OF VETERANS AFFAIRS

- January 26 - Met with Deputy Assistant Secretary for Equal Employment Opportunity to discuss concern about sexual harassment issues and to direct that actions be taken to eliminate it throughout VA.
- February 02 - Notified White House of review of EEO program, with special attention to sexual harassment and gender discrimination.
- February 10 - Sent Deputy Secretary Gober to Atlanta for an on-site review of sexual harassment issues/situation.
- February 16 - Issued "All Employee Letter:"
- o Declares sexual harassment is unacceptable conduct and will not be tolerated.
  - o States strong personal commitment to prevent and eliminate sexual harassment in VA.
  - o Requires prompt action and impartial review for sexual harassment allegations.
- February 25 - Suspended the decentralization of discrimination/sexual harassment complaint processing. Office of Equal Opportunity will assign all investigators.
- Established requirement for higher level review of all sexual harassment complaints. Regional Directors in field and heads of organizations in Central Office will be notified whenever complaint is filed.
- March 9 - Issued "All Employee Letter:"
- o Requires all current employees be given minimum of 4 hours training on the prevention of sexual harassment and the discrimination complaint process and refresher training every 2 years.
  - o New employees must have the 4 hours of training within 60 days of employment.
  - o All counselors must receive training certified by Central Office before performing counselor duties.
  - o Employees must be allowed to select an EEO Counselor of their choice.
  - o Provided a copy of the new discrimination/sexual harassment complaint procedures.
- March 10 - Authorized establishment of an "EEO INFO LINE" (800 number) in VACO/OEO to provide VA employees, veterans and others information and advice on discrimination and sexual harassment complaints.
- March 11 - Activates Work Group on Sexual Harassment to address sexual harassment and other gender related issues. Group to meet in mid-April with Secretary.



COMPONENTS OF THE DEPARTMENT OF VETERANS AFFAIRS  
MOVE TO ELIMINATE SEXUAL HARASSMENT

Veterans Health Administration

Training as part of orientation for all new employees, July 1992

Oversight Committee to assure corrective actions where IG identified problems, August 1992

Teleconference with medical center directors addressing sexual harassment, August 1992

Regional Directors' directive requiring policy statement at every facility, August 1992

Personnel Officers Conference sessions, September 1992

Training for RMEC Council, October 1992

All Station letter, October 1992

Senior Managers Conference session, November 1992

Purchase and distribute training videos to Regional Offices, November 1992

Mandated Expedited Procedures for sexual harassment allegations, December 1992

Appoint additional EEO Specialists in each region, December 1992

Tracking System for prompt intervention, January 1993

Require medical centers to make monthly reports on sexual harassment allegations, January 1993

Reissue Policy Statement, January 1993

Develop informational material, February 1993

Distribute training materials from OEO, February 1993

Memorandum regarding EEO counseling, February 1993

Employee Survey, March 1993

Veterans Benefits Administration

Director's Conference session, September 20-25, 1992

Policy Statement to all employees, September 28, 1992

SES Training, December 18, 1992

Personnel Officer's Conference session, February 1-5, 1993

Central Office Manager's training, February 25, 1993

Regional Office hotline calls with area Directors

Training at 32 field stations

Information in policy statements, employee newsletters, posters, bulletin boards

Office of the General Counsel

Survey of Sexual Harassment Case Law, September 1992

Video presentation to Central Office managers, February 26, 1993

2.

National Cemetery System

National Conference session, January 1992

Central Office employees training, March 1992

Procedures for Handling Allegations of Sexual Harassment,  
January 1993

Atlanta Area Office personnel training, February 1993

Philadelphia Area Conference session, March 1993

Denver Area Conference session, scheduled for April 1993

Lending Library of instructional videotapes established, 1992

Office of Equal OpportunityEstablished additional level of review for sexual harassment  
casesAmending complaint processing regulations to implement special  
procedures for sexual harassment complaints

Revised EEO Counselor training materials

Revised EEO Investigator training materials

Training developed and delivered to various Medical Centers  
and Regional Offices

Training materials provided to VBA and VHA

Recommended videotapes for VA Medical Library System

Rescinded proposed regulation which would have decentralized  
complaint processing in order to ensure objectivityAssistant Secretary for Policy & PlanningSeminar for all employees presented by the Office of Equal  
OpportunityOffice of Administration

Three hour training session for every employee, FY 1992

Office of Information Resources Management

Training session for all supervisors

Office of Acquisition and Materiel Management

Policy Statement, September 6, 1992

Staff training by the Office of the General Counsel,  
October 22, 1992

Policy Statement, December 16, 1992

Dissemination of General Counsel paper, February 12, 1993

Policy Statement including specific examples of sexual  
harassment, February 19, 1993

**NOVA**

**NURSES ORGANIZATION OF VETERANS AFFAIRS**

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*Statement of*  
*Nurses Organization of Veterans Affairs*

*NOVA*

*By*

**Bette L. Davis, MSN, RN, CS**  
**President**

*Before the*

**Committee on Veterans' Affairs**  
**U.S. House of Representatives**

*On*

**H.R. 1032**  
**Department of Veterans Affairs Employment Discrimination Act**

**March 30, 1993**

Mr. Chairman and Members of the Committee, I am Bette L. Davis, M.S.N., R.N., C.S., a Clinical Nurse Specialist at the Washington, D.C. Veterans Affairs Medical Center. As the President of the Nurses Organization of Veterans Affairs (NOVA), I am testifying on behalf of NOVA and speaking for more than 39,000 VA nurses.

NOVA is pleased to be here today to testify on H.R. 1032, the "Department of Veterans Affairs Employment Discrimination Act", a bill to provide for improved and expedited procedures for resolving complaints of unlawful employment discrimination arising within the Department of Veterans Affairs.

Equal Employment Opportunity (EEO) policies within VA to prevent, report, document and address discriminatory practices are of great interest to NOVA, a strong and determined advocate of all VA employees. NOVA recognizes that today's important legislation will help ensure an impartial delivery of EEO services provided by VA to employees who experience or may experience acts of discrimination in the workplace.

NOVA is also gratified to see the Employee Letter from DVA Secretary Jesse Brown, received on March 9, 1993, expressing his strong commitment to prevention and elimination of discrimination and sexual harassment in the Department. Some of the key proposed policy changes include monitoring and evaluating the EEO complaint processing operations at field facilities and requiring mandatory training for all employees on prevention of sexual harassment and the discrimination complaint process.

Our comments regarding specific selected sections of H.R. 1032 are detailed in the ensuing pages.

#### Section 2, Chapter 8 - Employment Discrimination

##### Section 802 Office of Employment Discrimination Complaints Resolution

NOVA endorses establishment of an independent office in the Department of Veterans Affairs to handle all discrimination complaints, including complaints of sexual harassment.

This legislative initiative attests to the importance of the testimony presented

before the House Veterans' Affairs Committee and the Senate Veterans' Affairs Committee in the summer and fall of 1992. Specifically, the Inspector General's review of several VA Medical Centers indicated a need, as did the testimony of other witnesses before the Committee, for all the provisions in this bill. A systemic change in the EEO process that improves its effectiveness should increase confidence in the independence and validity of the process for each medical center.

A separate Office of Employment Discrimination Complaints, headed by a director who reports directly to the Deputy Secretary and the Secretary, lends credence to the notion that the head of the agency can do something -- be accountable, since each case can be carried through the EEO investigation to the Secretary, independent of the hospital director.

Under the current system, the medical center director at each VA facility is the designated EEO officer responsible for the effectiveness of the EEO process for resolving complaints. This locally-controlled complaint processing system can delay formal complaint processing for years, because it can be used to protect local offenders. Also, it is a dis-incentive to move into the formal process because of the cost to the local facility.

Furnishing resources, such as a budget, for the Office, requiring annual written reports on the number and nature of complaints, as well as a description of the timeliness of the resolution of complaints, and a statement of significant decisions and trends affecting the work of the Office, will definitely enhance the quality of the complaint process. We also may get better answers and more timely responses to the real complaints.

#### Section 803 Informal Complaint Resolution

NOVA endorses the proposal to employ full-time permanent EEO counselors who will be better-trained and independent of local managers. Outside, professionally-trained staff that is knowledgeable of criteria regarding EEO discrimination, will afford both parties, complainants and alleged offenders, the opportunity to provide more factual information for impartial reviews in identifying and resolving discrimination

complaints.

Currently, EEO counselors have full-time jobs in addition to their assignments as counselors. At any one time a counselor may not have any cases; or, as many as five or six cases, which ultimately affects patient care and proficiency. There are only so many hours in a work day. It is unreasonable to expect local personnel to perform two full-time jobs.

Current EEO counselors have expressed the feeling that they are caught between the complainant and the defendant, especially if the complaint was not resolved at the lowest level, or the resolution wasn't perceived as satisfactory. Although many cases are said to be positive and rewarding experiences for the counselors, doing the job is full of hassles. Getting papers typed, finding a private meeting place, obtaining forms, seeking additional information and guidance, and finding a biased position in the personnel service if someone in higher management is involved, are just a few of the common occurrences. Clearly, it is preferable that the counselor not be an employee of the facility where the complaint originates.

#### Section 804 Investigation of Complaints

If complaints of unlawful employment discrimination are not resolved informally, then it makes sense to have an administrative law judge determine whether the complaint is accepted for investigation in accordance with Regulations of the Equal Employment Opportunity Commission.

For formal complaints, NOVA applauds the utilization of professionally-trained, full-time permanent investigators to investigate and prepare reports for the administrative law judges. This should produce a more just and efficient process compared to the current practice of using VA employees to conduct investigations while on administrative leave from their regular jobs.

#### Section 805 Final Agency Decisions; Hearings

#### Section 806 Review of Final Agency Decisions

NOVA supports assigning administrative law judges with expertise in employment

discrimination law to make final agency decisions in EEO cases not resolved through informal procedures. This legislative provision to require use of ALJs throughout the decision making-process, including hearings, is an effort to ensure agency impartiality and demonstrates a commitment to those in the VA workforce, especially those who have experienced some sort of discrimination during their employment with VA.

Removing this decision-making responsibility from the VA Office of General Counsel lessens the likelihood of a conflict of interest in defending the agency's actions and in advising agency officials.

#### Section 807 Unlawful Employment Discrimination Defined

The term "unlawful employment discrimination" means any action, or failure to act, that is a violation of the four laws designated in this chapter: The Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Fair Labor Standards Act of 1938 and the Rehabilitation Act of 1973.

A major concern to NOVA is how to define those actions, or failures to act, which are less explicit or certain as determined by law. Issues not openly acknowledged, which exemplify a prejudicial attitude and fall within the category of discriminatory practices in the workplace that affect gender-related occupations such as nursing, are an example. While VA's initiatives and leadership have increased in recognizing and responding to the needs of women veterans over the past five years, there remain subtle work practices affecting large numbers of women.

The Veterans Health Administration (VHA) workforce is more than 58 percent female, of whom registered nurses are the largest group within the Department. Yet, patient behavior problems seemingly are responded to more slowly when involving nurses. For example, the decision to transfer a violent psychiatric patient to a more secure facility was not made until a male physician was attacked, despite the fact that several nurses were attacked on earlier occasions. Nurses often are harassed, assaulted or stalked by patients, especially those in psychiatric settings. Clearly, appropriate responses to ensure proper treatment of employees is just as important as the proper treatment of veterans in their daily face-to-face interaction.

It is often difficult to determine if nurses are being treated in a particular way because they are nurses or because they are women. Historically, nurses (of whom 95% are female) were taught to be subservient, indirect, and not to challenge the male-and physician-dominated hospital power structure. Now, there is great reluctance to even share this authority with nurse executives who carry 24-hour responsibility for nursing care to patients, without which there can be no hospitals.

Once again, Mr. Chairman and members of the committee, NOVA raises the underlying issue of occupational- and gender-biased behavior at the highest levels of the organization and in each medical center. Over the years, NOVA has called for restructuring at the medical center for elevation of the VAMC chief nurse position to the leadership triad with the medical center associate director and chief of staff. This kind of exclusion from an authority level contributes and encourages *de facto* discrimination against a large class of women in the Department.

In conclusion, NOVA applauds Chairman Montgomery and the members of this committee for this legislative initiative. We thank them for their diligence and commitment to the Veteran Affairs system. Thank you, too, for the opportunity for NOVA to testify here today.

I am now available to answer your questions.



STATEMENT OF  
 LENNOX E. GILMER  
 ASSOCIATE NATIONAL EMPLOYMENT DIRECTOR  
 OF THE  
 DISABLED AMERICAN VETERANS  
 BEFORE THE  
 COMMITTEE ON VETERANS AFFAIRS  
 U.S. HOUSE OF REPRESENTATIVES  
 MARCH 24, 1993

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

On behalf of the more than 1.4 million members of the Disabled American Veterans and its Womens' Auxiliary, I wish to thank you for this opportunity to present our views on H.R. 1032, the, "Department of Veteran Affairs Employment Discrimination Act."

Mr. Chairman, you, Vice Chairman Bob Stump and the twenty-nine cosponsors of this bill are to be commended for introducing this critical piece of legislation at this opportune time.

Civil rights laws are based on the fundamental human precept that all people, regardless of sex, race, ethnic origin, disability, age or creed are to be treated with dignity. Wherever actions, real or perceived, are allowed to stand that undermine that simple but critical human need, we all suffer. Clearly, the aggrieved party is harmed, but by closing our eyes, our own dignity is also assaulted.

Agencies that condone civil rights violations, real or perceived, demoralize and dehumanize not only their employees but also the people who are supposed to benefit from the services provided by those employees.

We could not be more pleased with the purpose of this bill. We believe that this measure supports the generally held belief that we are a nation of laws and people should be able to rely on and trust federal agencies, in this case the Department of Veterans Affairs, to adhere to civil rights law.

Mr. Chairman, while we have no specific resolution from our national convention addressing this bill, resolutions have been passed year after year at our national conventions seeking the enactment of legislation assuring the protection of the civil rights of disabled veterans. While the impetus for this legislation may be sexual harassment, this much needed legislation should dramatically improve the processing of all civil rights complaints. We support the intent of H.R. 1032.

This bill, if enacted, goes a long way toward addressing perceptions that have demoralized many employees because they felt there was no place to go when they were wronged. Many feel they work in a closed environment where the civil rights complaint processes are controlled by the administrators whose interests are better served when civil rights violations are covered up, not identified and addressed.

No one should find it strange that agency employees do not trust a system where the EEO counselor and the EEO investigator, regardless of how well meaning or technically proficient, perform their Equal Employment Opportunity (EEO) responsibilities as a collateral duty. Thus, employees with EEO responsibilities are required to absent themselves from their own careers and advancement to ask probing and possibly self-destructive questions of peers and supervisors about alleged illegalities. This has contributed to a high turnover

(2)

of EEO counselors and investigators. This obvious conflict of interest can only be seen as serving the interests of the agency.

Mr. Chairman, Section 2 of H.R. 1032 would create a new chapter -- Employment Discrimination -- in Title 38 USC. The proposed Section 801 acknowledges the agency's obligation to adhere to the Equal Employment Opportunity Commission (EEOC) regulations which set out the civil rights complaint procedures.

The measure proposes a new organizational structure providing an Office of Employment Discrimination Complaints Resolution with a staff conducting the precomplaint through the final investigative stage. The Director of this office would answer directly to the Secretary and Deputy Secretary of VA. These proposals help assure: (1) that systemic problems will not be covered over by lower level administrators who may be adversely impacted when civil rights violations are disclosed; (2) that the turnover of EEO counselors will be reduced because this will be their job, not a collateral duty, and should provide for better trained staff with greater in-depth knowledge of civil rights law, processes and complaint resolution techniques; and (3) that, agency adherence to employees rights in the implementation of the EEO process will improve.

Mr. Chairman, while the DAV supports the intent of H.R. 1032, we do suggest that the proposed Sections 804 and 805 providing for the use of Administrative Law Judges (ALJ's) be reconsidered in light of the following concerns.

ALJ's make fact-based decisions in accordance with the Administrative Procedures Act (APA). The APA intended that ALJ's would conduct hearings on the record to draw out facts in a dispute and come to an independent decision when applying the standards of the law to those facts. Title 5 USC 3105 provides for the appointment of ALJ's to conduct proceedings in accordance with Title 5 USC 556 and 557 and restricts their duties to only those purposes. Section 556 describes the ALJ hearing process and Section 557 applies the standards for initial decisions; conclusiveness; review by agency; submissions by parties, contents of decisions; and the record for hearings conducted under Section 556.

The conduct of these hearings require that two disputing parties present their opposing views in a process which requires adherence to rules of evidence; timely filing of pleadings; and may involve the calling of witnesses; examination, cross-examination and redirect examination of those witnesses; and discovery of evidence. In contrast, the EEO process assumes that the employer, not the complainant, has the evidence, that the complainant is not aware of all the legal details of the law and should not have to be a legal expert or have to hire one to have their concerns addressed. In fact, the EEO process is designed to obtain evidence through an informal process which theoretically should encourage earlier resolution of the dispute.

In effect, the proposed Section 804 potentially introduces a more formal legal step into the complaint stage than is contemplated by current EEOC regulations. We note that Section 804(a) provides for the ALJ to make a determination as to whether a complaint should be accepted for investigation. Apparently, such a decision would be made without benefit of a hearing. Section 804(b)(1) indicates that such a decision would be based on whether or not the complaint has "merit." In the interest of avoiding bias by adjudicators, in this case ALJ's, the courts have ruled that the adjudicator should not have been previously involved in the investigation or advocacy concerning the underlying facts of the case (King v. Caesar Rooney School District., 380F. Supp. 1112 (D.C. Del. 1974), (Title

(3)

5 USC Annotated, P. 290). We believe the introduction of the adjudicator, who may later hear the complaint in the decision of whether or not to investigate, violates this legal tenet.

Mr. Chairman, we believe that obligating the ALJ to decide whether a complaint has "merit" prior to the investigative stage is untenable. Holding a hearing consistent with the APA, prior to the investigative stage, violates the concept of the less formal EEO process. Having the ALJ make a decision as to the "merits" of a complaint without evidence expected to be produced by the investigation or a hearing will not allow a decision based on facts. (Blacks Law Dictionary, Revised Fourth Edition, defines "merits" as follows: "The word merit as a legal term is to be regarded as referring to the strict legal rights of the parties.") We question how merit could be determined by a decider of fact, an ALJ, without the necessary evidence that would come forward through the investigation or a hearing.

Recognizing that law and limited resources dictate that the EEO process restrict its activities to legitimate legal functions, it is important to properly evaluate the elements of the EEO complaint at the complaint stage and to assign an investigator when appropriate. The general standard includes the following elements: (1) Jurisdiction - does the law provide authority for this complaint to be pursued in this process; (2) Prima facie claim - a claim that, if proven true, would be illegal discrimination; and (3) Remedy - there is a remedy under law. The EEOC regulation, policy and complaint decisions further define these elements. The proposed Section 801(a) reference to EEOC appears to be adequate to include these EEOC directives and precedent decisions. Thus, the effort to avoid investigating frivolous complaints by the language contained in proposed Section 804(b)(1) appears to be unnecessary. The introduction of the term "merit" may inadvertently introduce a new legal standard.

The proposed Section 804(c)(2) recognizes that some complaints have issues that should be assigned for investigation while other issues should be denied investigation. This section involves the ALJ in a decision to suspend the investigation of that portion of the EEO complaint that has been accepted for an investigation until there has been a review of the decision not to accept the other portion of the complaint. Once again, the ALJ is being involved in a decision without benefit of evidence or fact finding hearing. Our concerns here are the same as those we raised regarding the use of ALJ's in the decision to accept a complaint for investigation.

We support the intent of the proposed Section 805 but offer these recommendations for the Committees' consideration. The proposed Section 805 would introduce the ALJ into the informal complaint stage described at proposed Section 803, by requiring the ALJ to make the final agency decision when the complaint is unresolved at that stage. The ALJ "... shall grant..." a hearing on the matter unless the ALJ "... determines that there is no genuine dispute as to a material fact." Thus, a hearing must be held unless there is "... no genuine dispute as to a material fact." To avoid repeating the prior arguments, we will summarize our concerns that ALJ responsibilities, to now, are restricted to functions set out at Title 5 USC 556 and 557 which limits them to fact based decisions following hearings conducted on the record. This section provides for ALJ's making decisions outside of the scope of these APA restrictions, that is, make a decision without facts or a record leading to that decision. Complicating the issue is that an ALJ hearing consistent with the APA held at the informal stage, would violate the purpose of the informal EEO process required at 29 CFR Part 1614.

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If ALJ's are to be introduced into the VA EEO process, we would recommend that the law provide for expedited ALJ conducted hearings following the investigation at the formal complaint stage after the agency has administratively decided it cannot resolve the complaint and only if the complainant requests a hearing. An ALJ decision based on such a hearing would be the final agency decision and should bind the agency.

Mr. Chairman, our comments on this much needed legislation are intended to be supportive of the common objective of creating an inherently fairer VA EEO process. Our primary concern is that the EEO process not be formalized to such a degree that non-lawyers have to purchase legal advice to make the process work in its early stages by the premature introduction of ALJ's.

This concludes my testimony, Mr. Chairman. I would be pleased to respond to any question from you or members of the Committee.

## STATEMENT OF

BOB MANHAN, ASSISTANT DIRECTOR  
NATIONAL LEGISLATIVE SERVICE  
VETERANS OF FOREIGN WARS OF THE UNITED STATES

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS  
UNITED STATES HOUSE OF REPRESENTATIVES

WITH RESPECT TO

**H. R. 1032: THE DEPARTMENT OF VETERANS AFFAIRS  
EMPLOYMENT DISCRIMINATION ACT**

WASHINGTON, D.C.

MARCH 30, 1993

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you for inviting the Veterans of Foreign Wars of the United States (VFW) to participate in this very important but rather technical hearing. The thrust of bill H.R. 1032 deals with the problem of improving the effectiveness of the administrative review of Federal employment formal discrimination claims made by employees or prospective employees of the Department of Veterans Affairs (VA).

The scope and impact of this bill, which is entitled "Department of Veterans Affairs Employment Discrimination Act" is significant for two reasons. First, we must recall the size and configuration of VA. It is the second largest Federal agency in terms of employment averaging about 260,000 workers who are assigned to hundreds of different facilities located in every State, the District of Columbia, Puerto Rico, and the Philippines. Next, we recognize the significant change in the composition of the Federal workforce as mentioned in Department of Labor's (DOL) study "Workforce 2,000." In fact, the VA workforce is becoming more diverse, it does contain more women, more minorities, and requires more and more technical skills and expertise. Because of these features, the VFW strongly believes everything within reason should be done to ensure that VA employees will be treated fairly in the work place and that talent and performance be the yardstick for reward and professional achievement.

VA presently has an Equal Employment Office (EEO) at most of their installations that is staffed primarily by quasi-professional EEO personnel. The scope of complaints heard throughout this large department can range from the individual act of discrimination based on race, gender, age, or personal handicaps to possible adverse class-action discrimination issues involving informal but subtle organizational barriers that limit promotions and/or changes in career ladders. One such common barrier is euphemistically referred to as the "glass ceiling" which deals with the practice of limiting upward mobility of women and/or minorities into senior management positions.

To address the above cited problems, the bill H.R. 1032 entitled "Employment Discrimination" proposes to add a new Chapter 8 to title 38, United States Code (USC). Generally speaking, the VFW believes the thrust of the bill offers a good organizational approach to a more effective and efficient resolution of discrimination complaints. Specifically, the VFW strongly supports these parts of the bill that:

- establish an independent (emphasis added) office to oversee/manage the complaint process;
- provide for an outside review agency when applicable in the formal appellate process.

Collectively, these features will have the significant advantages of taking VA out of the business of judging itself as is the present situation. Also, this will greatly improve the accountability for responsibility and timeliness of complaint resolutions by creating such a professional EEO agency. This establishment of an office of employment discrimination complaint resolution, with the head of such office reporting to the Secretary of the agency as opposed to the director of personnel, cures one of the major defects associated with the existing apparatus for handling complaints.

Under the current complaint resolution process, the Equal Employment officer who is often supervised by the personnel director is placed in the untenable position of having to investigate a discrimination complaint where the complainant has charged the director with violating laws and policies in filling a vacant position.

The perception held by many is that it is only natural that the Equal Employment officer will experience pressure under this circumstance and most likely cannot conduct an unbiased investigation involving superior ranking office personnel.

The only point of disagreement the VFW does have with bill H.R. 1032 revolves around the proposal to create a new layer or element within the complaint system composed of administrative law judges (ALJs). We specifically question the need to require ALJs to investigate reports whenever a formal complaint has been initiated, nor do we support the principal that ALJs be used throughout the decision-making process. The rationale for this exclusive use of ALJs assigned by the EEO is to assure agency impartiality and to improve the overall response time for resolving complaints, as we understand H.R. 1032.

The VFW sincerely believes these same objectives can be obtained by implementing all the other parts of the bill that the VFW previously cited as favorable. In fact, by employing a number of such highly skilled and technically qualified lawyers, the VFW believes it is just possible that inadvertently the ALJs could take on an independent adversarial role within EEO and see violations where none actually exist. Therefore, the VFW's position is to support the entire concept of the bill with the exception of the new, expanded functions for ALJs.

Because the VFW has a long-standing record of supporting all efforts to ensure that VA employees will be treated fairly in the workplace, we are also monitoring the companion bills H.R. 1111 and S. 404. Each is entitled the "Federal Employee Fairness Act of 1993." The important point we make here is that if VA were to establish an EEO with the layer of ALJs so deeply involved in the entire complaint process that the VA's EEO organization would be unique within the entire Federal EEO system. While the VFW is not afraid to be different, we are very concerned about being effective.

Thank you, Mr. Chairman. This concludes our formal statement but I shall be pleased to respond to any questions you or any committee member may have.

United States General Accounting Office

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**GAO**

**Testimony**

Before the Committee on Veterans' Affairs  
House of Representatives

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For Release on Delivery  
Expected at  
9:00 a.m. EST  
Tuesday  
March 30, 1993

**FEDERAL  
EMPLOYMENT**

**Sexual Harassment at the  
Department of Veterans Affairs**

Statement of  
Nancy Kingsbury, Director,  
Federal Human Resource Management Issues,  
General Government Division



Sexual Harassment at the Department of Veterans Affairs  
Summary statement by  
Nancy Kingsbury, Director  
Federal Human Resource Management Issues

GAO recently has begun a review at the Department of Veterans Affairs (VA) to identify whether there are any factors that discourage employees at VA's medical centers from filing sexual harassment complaints. To date, GAO has examined VA's Equal Employment Opportunity (EEO) policies and procedures, scrutinized 37 of 101 closed formal complaints filed at VA between fiscal year 1989 and the beginning of fiscal year 1993, met with the Secretary of Veterans Affairs, and interviewed officials in VA's EEO and IG offices.

The complaints GAO examined were filed, investigated, and resolved under a decentralized system which vested the responsibility for dealing with such complaints with the directors of VA's 171 medical centers. Counseling and investigations were done by employees who were assigned to do so on a part-time basis for relatively short periods of time. GAO's review found that (a) a third of the complaints were rejected on procedural grounds; (b) complaints that were accepted were not investigated promptly, thus requiring complainants to continue to work for long periods in the environment being complained about; and (c) about half of the complainants perceived that actions were taken or threatened against them in reprisal for their complaints. In GAO's view, the procedures used for complaint processing did not provide appropriate independence and oversight of complaint resolution because the medical center director was both the deciding official on the complaint and the management official responsible for ensuring a non-discriminatory environment.

Since his appointment in January, the Secretary of Veterans Affairs has taken several steps to resolve the problems noted above. He has established new procedures requiring joint review of complaints by medical center directors and regional officials, a program of mandatory sexual harassment training for employees, and a task force to consider further actions which may be necessary. While these steps are significant, it will take time to assess their impact, and concerns remain about the timeliness of complaint resolution and the qualifications and availability of part-time counselors and investigators.

The proposed Department of Veterans Affairs Employment Discrimination Act goes even further in changing VA's process for managing its sexual harassment cases. However, GAO also noted that the Senate has a bill, S. 404, which proposes alternative procedures for all federal agencies in dealing with sexual harassment. In enacting H.R. 1032, the Committee may want to continue to monitor such alternative approaches as the VA program is implemented, to see whether the VA experience can offer lessons learned that can be applied governmentwide.



Mr. Chairman and Members of the Committee:

I am pleased to be here today to participate in this hearing on H.R. 1032, a bill which proposes new procedures for handling employment discrimination complaints, including complaints of sexual harassment, at the Department of Veterans Affairs. At the time we received your request to testify on the proposed Department of Veterans Affairs Employment Discrimination Act, we were in the process of responding to a request by your Subcommittee on Oversight and Investigations to review VA's procedures for handling sexual harassment complaints. Our review has focused on examining the records of closed formal sexual harassment complaints to determine how the cases were processed and resolved.

Although our review is still underway, we are providing today our interim observations on VA's system for handling sexual harassment complaints. I will also comment on initiatives undertaken by the new Secretary of Veterans Affairs to resolve some of the problems we observed, and on how the proposed Department of Veterans Affairs Employment Discrimination Act would address these problems.

#### BACKGROUND

Under the Civil Rights Act of 1964, as amended, EEO regulations, and numerous federal court decisions, federal agencies are held to rigorous standards in prohibiting sexual harassment in the workplace. For example, under these laws, an employer can be liable for sexual harassment committed in the workplace if it failed to take adequate measures to prevent it. In addition, employers can be liable for sexual harassment committed by supervisors, even if they were not aware of the harassment.

Regulations governing the procedures and timeframes under which federal agencies must address sexual harassment incidents are

issued by the Equal Employment Opportunity Commission (EEOC). These procedures provide for (1) agency-provided informal counseling assistance to the complainant, (2) the opportunity to file a formal complaint against the alleged harasser by the complainant, (3) acceptance or rejection of the complaint by the agency on substantive or procedural grounds, (4) investigation of the complaint by the agency or the EEOC, and (5) a final decision on the complaint by the agency, the EEOC or a federal court. To meet these standards, it is necessary to ensure that employees and supervisors understand the nature of sexual harassment and their responsibilities to prevent it or to take appropriate action if it occurs.

#### FORMAL COMPLAINTS OF SEXUAL HARASSMENT AT VA

According to VA's automated EEO database, a total of 101 sexual harassment complaints were closed between the beginning of fiscal year 1989 and the start of fiscal year 1993. To date, we have examined 37 of these closed formal complaints. Although all these complaints were presented to us by VA as closed, we found that 7 either were not closed, or they addressed other types of issues, such as reprisals.

The remaining 30 sexual harassment cases we reviewed in depth were from 29 medical centers. Of the 30, 10 were settled, 9 were closed by procedural rejection, 5 were withdrawn by the complainants, 5 were closed by the agency with no finding of discrimination, and the status of 1 could not be determined from the files. At least 19 of the 30 complainants alleged sexual harassment by supervisors, with most of the others being by co-workers. The types of alleged activity included sexual assaults (including intercourse), unwanted sexual advances that included touching and abusive language, exposure of private parts, and suggestive remarks.

VA PROCEDURES FOR PROCESSINGCOMPLAINTS HAVE RECENTLY BEEN CHANGED

Under VA's system for handling the complaints we reviewed, the responsibility for processing and making most major decisions on the complaints was decentralized to the heads of field offices such as medical center directors. These directors or their designees (1) appointed employees at their center to be part-time counselors and investigators, (2) contacted the complainants about the acceptance or rejection of their complaints, and (3) proposed conditions for settling complaints. VA's procedures called for proposals by center directors to reject complaints to be approved by VA's Office of General Counsel at headquarters. Once a complaint was accepted however, there was little external oversight over the processes that were used and the decisions that were made.

In recent weeks, VA has taken certain actions to strengthen its system for dealing with sexual harassment. For example, it has revised complaint procedures to include oversight by regional offices of the handling of formal complaints by medical center officials, and provided medical center employees with the right to consult with the EEO counselor of their choice as they try to decide how to proceed with their informal complaint. VA also has recently established requirements and materials for new and periodic training that focuses on sexual harassment and complaint processing for all employees, EEO counselors and investigators. However, because of the recency of these changes, it is too early to assess their effect.

ORGANIZATIONAL STRUCTURE FOR COMPLAINT PROCESSING PROVIDEDINSUFFICIENT INDEPENDENCE AND OVERSIGHT

Under the procedures in force until recently, VA's 171 medical center directors were the principal officials responsible for

resolving sexual harassment complaints, but with limited oversight. As a result, the director was both (1) the employer representative ultimately responsible for operational activities at the medical center, and (2) the EEO officer responsible for assuring proper counseling, investigation, and resolution of sexual harassment complaints. Directors also appointed center employees to be EEO counselors. These counselors handled sexual harassment complaints on a part-time basis in addition to their regular duties. Moreover, because some complaints involved senior medical center officials or even directors themselves, the counselors were placed in the position of making recommendations that could adversely affect the director -- the person for whom they worked.

Given these potential tensions, VA employees who were not satisfied with the outcome of their complaints could understandably question the independence and objectivity of the medical center officials who dealt with them. In this regard, our review of the files also disclosed indications that certain medical center directors or their designees actively sought to discourage complaints from being filed.

MANY COMPLAINTS WERE EITHER PROCEDURALLY REJECTED, OR HAD THEIR ACCEPTANCE DELAYED

About one-third of the 101 formal sexual harassment complaints identified by VA as having been filed and closed since the beginning of fiscal year 1989 were rejected for procedural reasons; that is, they were deemed not to have been filed correctly. Of the 30 formal sexual harassment complaints we reviewed, 9 were procedurally rejected for reasons such as not contacting a counselor within 30 days of the alleged harassment. Six of the 30 complaints had been proposed for rejection by medical center directors, but the proposals were not accepted by the Office of General Counsel at VA headquarters. Two others

were discouraged by the EEO counselors who provided incorrect information to the complainants.

This evidence -- that complainants may not have sufficient information to file complaints properly and that decisions to reject complaints were overturned as improper -- suggests that both complainants and agency officials doing EEO counseling and investigations and making EEO decisions needed further training as to how the EEO process, and especially the sexual harassment process, is supposed to work. Under an EEO system decentralized to 171 medical centers, however, it was difficult to ensure that training for handling sexual harassment complaints had been consistently provided.

As a further indication of a need for additional training, VA headquarters EEO officials told us that about one-third of the approximately 900 counselors and 300 investigators, most located at the medical centers, turn over each year. The officials said turnover prevented VA from training all counselors and investigators to properly handle complaints, or re-training them if they handled complaints improperly.

#### DELAYS IN SCHEDULING INVESTIGATIONS

Once complaints are accepted by the agency, they must be scheduled for investigation. According to VA officials, once a formal complaint was filed, each medical center director selected an investigator from a pool of employees temporarily available as investigators from centers other than the one headed by the director. Most of these employees had been appointed to serve on a part-time basis in addition to their regular duties.

In the 30 formal complaints GAO reviewed, 12 appeared to have been investigated. In 8 of the 12 complaints, an average of over 5 months had elapsed before investigations were scheduled. In

the longest case, about 14 months elapsed before an investigation was scheduled. For complainants, such long timeframes extended the discomfort of the situation for which they had filed a complaint, and also could have led them and others to perceive that their complaints were not considered to be very important.

#### MANY COMPLAINANTS PERCEIVED REPRISALS

Of the 30 sexual harassment complaints we reviewed, 10 complainants perceived certain agency actions as reprisals against them for having filed their complaints. The actions alleged to have been taken included denial of leave, reductions in duties, unsatisfactory performance appraisals, and transfers against their will. Five additional complainants cited no definite agency actions, but said that supervisors threatened them with bad performance ratings or said they feared other reprisals. In at least seven cases, officials considered to be part of the centers' management - immediate or higher level supervisors, including a medical center director - were alleged as harassers.

Under the system in operation at VA until recently, such reprisal actions would have been difficult to detect. The officials whom complainants believed were guilty of reprisals could have been the officials initially responsible for determining whether reprisals had occurred.

#### THE DEPARTMENT OF VETERANS AFFAIRS EMPLOYMENT DISCRIMINATION ACT FURTHER CHANGES VA'S STRUCTURE FOR EXAMINING COMPLAINTS

Earlier, I pointed out changes made by the VA Secretary to strengthen the system for dealing with sexual harassment. H. R. 1032 goes even further in dealing with many of the conditions we observed. It establishes an Office of Employment Discrimination Complaints Resolution (Complaints Office) at VA.

The director of this office would have sole responsibility for administering the procedures for resolving EEO complaints and would report directly to the VA Secretary or the Deputy Secretary. Under this organizational arrangement, the dual responsibilities of medical center directors as discussed above, would be eliminated.

Additionally, the proposed legislation requires the acceptance, rejection, and adjudication of complaints to be done by administrative law judges and provides that VA employees who would do the counseling and investigating in sexual harassment complaints be employed by and report to the Complaints Office. Administrative law judges would know the EEO process and it would appear that their decisions to accept or reject cases would be more consistently correct. Also, EEO work would be the full-time responsibility of counselors and investigators. Therefore, they would have no other duties competing for their attention and their training could be more easily managed.

H.R. 1032 has the potential for significantly improving VA's mechanism for handling of sexual harassment and other EEO complaints; however, it is not the only approach that is being considered. As you may know, the United States Senate is considering another bill, S.404, which proposes alternative procedures for all federal agencies in dealing with EEO complaints, including sexual harassment. In enacting H.R. 1032, the Committee may want to continue to monitor such alternative proposals as the VA program is implemented, to see whether the VA experience can offer lessons learned that can be applied governmentwide.

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In concluding my testimony, I offer the observation that successfully dealing with sexual harassment will take more than

legislation. It is vitally important for management to make it clear that it will not tolerate such behavior and to back this up by effectively dealing with employees who engage in such practices. Based on my recent meeting with the Secretary of VA to discuss this issue, it appears to me that the Secretary is willing to make such a commitment. It will be important to review the situation at VA after some time has passed to determine the effect of his initiatives.

I would now welcome any comments or questions that you may have.  
(966561)





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In Service to America

March 11, 1993

The Honorable Chairman Sonny Montgomery  
U.S. House Committee on Veterans' Affairs  
335 Cannon House Office Building  
Washington, D.C. 20515

Dear Chairman Montgomery:

I want to express the appreciation and congratulations of Vietnam Veterans of America for your initiative addressing the sexual harassment/employment discrimination problems in the Department of Veterans Affairs with your legislation H.R. 1032. I regret that VVA will be unable to present testimony at the March 24 hearing, but please be assured that our members are heartened by the rectification of justice intended by this bill.

We are also pleased to see that Secretary Brown has moved decisively to deal with the situation in Atlanta and elsewhere, and has developed a plan to administratively prevent such abuses in the future. Even so, you and I both know that statutory guidelines such as those present in H.R. 1032 are necessary to ensure continuity in departmental policy. This being the case, VVA will support your legislation in every way. We are concerned that female employees of the Department of Veterans Affairs, as well as women veterans receive equitable and appropriate treatment in all aspects of VA's programs and policies.

Again, we commend your initiative on this legislation and wholeheartedly support your efforts. If VVA can provide any assistance in the advancement of H.R. 1032, please feel free to contact us with any guidance you may wish to offer.

Sincerely,

Paul S. Egan  
Executive Director

PSE:krw



SERVING  
WITH  
PRIDE

AMVETS  
Statement for the Record  
before the  
House Committee on Veterans Affairs  
regarding  
H.R. 1032  
the

Department of Veterans Affairs Employment Discrimination Act



A M V E T S

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AMVETS appreciates the opportunity to present its views on the Department of Veterans Affairs Employment Discrimination Act.

AMVETS supports the intent of H.R. 1032. Employment discrimination and sexual harassment have no place in a society dedicated to equality before the law. It is vital for both the victim of harassment or discrimination and the Department to achieve a just resolution to the case. There can be no greater impediment to effective personnel management than the fact or perception of bias or harassment in the workplace, and unhappy employees are not efficient and aggressive in the delivery of veterans benefits.

It is important that any procedure in complaint resolution be above suspicion. It is unreasonable to expect fair resolution in any case where supervisory influences can be brought to bear or perceived as threatening to an unbiased investigation. Previous hearings on the subject have disclosed occasions where employees charged with complaint investigation were perpetrators of harassment or discrimination or had significant conflicts of interest in achieving an unbiased resolution.

The addition of administrative law judges (ALJ) to the complaint resolution process should bring an added dimension of confidence to final decisions. By setting up a separate chain of command with direct reporting responsibility to the Secretary and Deputy Secretary, it will become much more difficult for conflicts of interest to stymie investigations and influence final decisions. Will the process be completely free from potential bias - certainly not, but absent a fully independent investigation and adjudication organization that will provide expeditious resolution of complaints, it is the next best thing.

However AMVETS is concerned about the apparent requirement to absorb the cost of the program with existing funds and FTEE allowances at a time when the administration proposes to cut 9,000 personnel from the VA.

VA internal management efforts to eliminate the procedural bottlenecks that discouraged employees from filing complaints are commendable, but do not eradicate the perception of the potential for biased investigations and decisions by department employees who may have conflicts of interest. AMVETS also welcomes the Secretary's pro-active stance on these issues and his policy of zero tolerance regarding sexual harassment and discrimination.

We note that the bill allows for informal resolution prior to entering the more formal ALJ adjudication process, and that is as it should be. However, the bill is unclear about the transition from informal to the formal resolution process. Is the ALJ constrained to a decision on the merits of the complaint based solely upon a formal presentation of evidence, as prescribed by the Administrative Procedures Act (APA), or is an administrative review of the informal investigation by the ALJ sufficient to render a decision on whether to proceed with formal investigation?

If the intent of the H.R. 1032 is to allow for administrative review to determine the merits of the complaint, AMVETS suggests the addition of language to the bill to that effect including minimum information requirements for the informal investigation.

AMVETS supports administrative review of the informal investigation with the understanding that sufficient information shall be presented to the ALJ upon which to base a decision to proceed or not to proceed. Our support is also predicated upon the understanding that a decision not to proceed will not preclude appeal to the proper authorities outside the VA in instances where the ALJ decides the complaint has no merit.

We are also concerned about who will bear the cost of representation during a formal hearing process. Therefore our support is also predicated on an award of attorney's fees in all cases where the complainant prevails.

Finally, AMVETS is concerned about the dangers of adding a layer of bureaucracy and the potential for creating yet another administrative backlog within a department already encumbered with huge caseloads.

In summary, AMVETS supports the intent of HR. 1032. It will codify procedures that may act as a model for complaint resolution for the rest of the government. We feel the program will require oversight by Congress to determine its effectiveness, but we also urge Congress to resist the urge to micro-manage the department.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO



John N. Sturdivant  
National President

Bobby L. Harnage  
National Secretary-Treasurer

Joan C. Welsh  
Director, Women's Department  
4a/Leg.

March 19, 1993

The Honorable G.V. (Sonny) Montgomery  
Chairman, House Veterans' Affairs Committee  
335 Cannon House Office Building  
Washington, D.C. 20515

Re: H.R. 1032

Dear Chairman Montgomery:

Thank you for the opportunity to comment on H.R. 1032, a bill that removes VA employee's EEO cases from a unified complaint processing system, establishing instead a unique VA controlled EEO procedure for this federal agency only. While we commend the interest in improving the fairness and responsiveness of EEO complaint processing for federal employees, this bill falls far short of the needs of employees.

We have received numerous calls and letters from our members at the VA objecting to this proposal. Since it is generally accepted that a major defect in the present system is the extent of control of case processing by the accused agency, it makes no sense to us that more and more authority should be placed in the management that has demonstrated abuse of the current process. Indeed, the media notice of several recent VA horror stories of discrimination against employees is further evidence that true reform of the federal employee EEO case processing must include the transfer of case management to an independent agency. Moreover, we are concerned that H.R. 1032 would strip VA employees of several important rights and remedies, including the right to a de novo trial in court, and including the remedies provided in the Civil Rights Act of 1991. As you recall, these recent amendments to the Civil Rights Act were responsive to the lack of adequate remedies to victims of sexual harassment. We hope these new remedies will not be denied to VA employees.

We believe that H.R. 1032 is fundamentally flawed. We ask that the Committee consider these comments as our response. Finally, we encourage the Committee to consider the government-wide procedural reforms found in the Federal Employee Fairness Act of 1993, H.R. 1111 and the companion bill in the Senate, S. 404. We believe your concerns for fairness in the process,

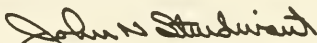
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page 2  
Chairman Montgomery

efficiency and responsiveness to allegations of employment discrimination, and government accountability, are addressed by these bills. In addition, the CBO projected annual \$25 million savings in the procedural reforms of H.R. 1111 and S. 404 demonstrate the value of a government-wide solution to a government-wide problem. We ask for your support of this effort. Thank you.

Sincerely,



John N. Sturdivant  
National President

April 19, 1993

The Honorable G.V. (Sonny) Montgomery  
Chairman  
House Committee on Veterans' Affairs  
335 Cannon House Office Building  
Washington, D.C. 20515-6335

Dear Mr. Chairman:

Please find enclosed a copy of testimony presented by the undersigned organizations on the Department of Veterans' Affairs Employment Discrimination Act.

We were advised by Committee staff that the Committee had kindly agreed to leave open the record from the hearing on this Act in order to receive the enclosed testimony.

We appreciate the opportunity to comment on the Act.

Very truly yours,

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Testimony on the  
Department of Veterans Affairs  
Employment Discrimination Act

Presented to the

House Committee on Veterans' Affairs

on behalf of

Federally Employed Women  
Mexican American Legal Defense and Education Fund  
National Federation of Federal Employees  
National Treasury Employees Union  
Washington Lawyers' Committee for Civil Rights Under Law

April 19, 1993

We appreciate the opportunity to comment upon the Department of Veterans Affairs Employment Discrimination Act. The organizations who join in this statement represent a coalition of 15 labor and civil rights groups who are greatly interested and have been active in efforts to reform the administrative procedures by which federal employees pursue equal employment claims. For more than seven years, many of the organizations subscribing to this statement have participated in multiple hearings before House and Senate Committees on this very important subject. Collectively, we represent the interests of more than a million federal employees and thus comment on H.R. 1032 with a great deal of interest in, and experience with, this issue.<sup>1</sup>

We commend the Committee on Veteran Affairs for its interest and swift action in pursuing a legislative reform of this arcane and ineffective administrative system. We, like you, believe such reform is long overdue and that it must be accomplished legislatively. We are also aware of the extensive record compiled by this Committee of discrimination, and particularly sexual harassment, committed at the Department in past years. Clearly the present system for investigating and resolving complaints of employment discrimination is wholly inadequate to address the significant needs there. Accordingly, we believe H.R. 1032 will offer important reforms to the antiquated EEO complaints adjudication system at the Department of Veterans Affairs.

At the same time, however, we believe that many of the problems with the EEO administrative process at the Department of

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<sup>1</sup> The organizations which join in this statement particularly appreciate the opportunity to submit this testimony after the hearing on this legislation has concluded. These groups expressed in a letter to Committee members immediately before the bill was reported some of the same views that are set forth in this statement. But, during the markup, amendments and clarifying remarks made by Committee members allayed some concerns that were earlier held. With the benefit of the amendments and the record compiled during the markup, these organizations can now present the more refined views about H.R. 1032 that are set forth in this testimony.

Veterans Affairs also afflict every other Executive agency.<sup>2</sup> We are particularly troubled by the conflict of interest created when federal agencies investigate and adjudicate EEO claims brought against themselves. We also believe it important that these reforms long needed throughout the Executive agencies be conducted comprehensively and uniformly and that a patchwork approach to reforming the system be avoided. Accordingly, we prefer a comprehensive legislative remedy that the Federal Employee Fairness Act would provide because it would eliminate conflicts of interest that H.R. 1032 has failed to eradicate and it would reform the EEO administrative process universally.<sup>3</sup> Nonetheless, H.R. 1032 represents a valuable first effort to address the repeated equal employment violations that have plagued the Department of Veterans Affairs. Once the Federal Employee Fairness Act is enacted and becomes effective, of course, we expect that its comprehensive provisions will supersede the procedures that H.R. 1032 would provide.

Still, there are a couple concerns that should be addressed before H.R. 1032 is enacted. First, H.R. 1032 allows lower level agency employees, rather than the more independent Administrative Law Judges ("ALJs"), to conduct the hearings on EEO claims. The ALJs to whom the Bill entrusts the authority to conduct hearings of

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<sup>2</sup> All civilian employees at Executive agencies are subject to the same procedures for processing EEO complaints. See 29 CFR 1614.

<sup>3</sup> The Federal Employee Fairness Act would achieve other valuable improvements to the federal EEO administrative process which H.R. 1032 fails to provide. First, for example, the FEFA would streamline the administrative process and eliminate duplicative services offered by each Executive agency, resulting in annual costs savings throughout the government that the Congressional Budget Office estimates to be \$25 million. Second, the FEFA provides for a mechanism by which employees proved to have committed discrimination will be carefully considered for sanctions. Third, the FEFA provides new procedures to strengthen protections against retaliation directed at those who bring EEO claims or help others to pursue such claims. Fourth, the FEFA would extend the time period within which federal employees may initiate EEO claims to bring them in conformity with the private sector time periods. Fifth, the FEFA would provide additional precautions to ensure that all the relevant facts are collected before hearings are held on the EEO claims. Sixth, the FEFA would greatly simplify the complex procedures for handling "mixed cases," in which civil service claims are paired with claims of discrimination.



EEO claims have greater independence from the Department than ordinary civil servants because ALJs can only be removed from office for good cause. See 5 U.S.C § 3105 (199? Supp.); Federal Trial Examiners Conference v. Ramspeck, 104 F.Supp. 734 (D.D.C. 1952). But § 805 (c) of the Bill allows ALJs to refer any case to agency hearing examiners, who lack any independence from the Department. On such occasions in which hearing examiners conduct hearings of the EEO claims, the limited independence from the Department enjoyed by ALJs will fail to insulate the person hearing the claim from the pressures that a conflict of interest creates. Accordingly, what little relief from the conflicts of interest that H.R. 1032 offers by entrusting the adjudication of the EEO claims to ALJs can be vitiated routinely by the delegation of such decisionmaking to ordinary agency hearing examiners.<sup>4</sup>

Second, we are concerned that nothing in H.R. 1032 jeopardize the highly valued right of complainants to have their claims heard de novo in the federal courts where they receive adverse administrative decisions. This right to have claims tried on new evidence in the federal courts, rather than on the same evidence collected during the more limited administrative proceedings, was clearly established by the Supreme Court nearly 20 years ago. See Chandler v. Roudebush, 425 U.S. 840 (1976). The Act's reliance upon the Administrative Procedure Act as the basis for adjudicating EEO claims at the Department may leave some with the impression that only review of the administrative record was contemplated in the federal court trials. See 5 U.S.C. § 706 (2) (E) (limiting judicial review of administrative adjudications to the record compiled during the agency proceeding). While an amendment was adopted during markup as § 801 (c) of the Act which provides that

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<sup>4</sup> While § 805 (a) provides that the ALJ will make the final decision on all complaints of discrimination, presumably including those referred to hearing examiners for hearing, that provision does not guarantee the independence necessary to eliminate conflicts of interest. Where hearing examiners preside over hearings of discrimination complaints, they will rule on the admissibility of evidence and observe the demeanor of witnesses. Therefore, the decisions reached by ALJs will inevitably be influenced by the rulings and observations of the hearing examiners, particularly where conflicting testimony requires assessments of witness credibility.

nothing in the Bill will supersede the rights and remedies available under Title VII, express support for this right to de novo review should be reflected in the Committee Report to avoid any confusion over the continued vitality of this important right.

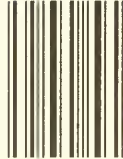
In conclusion, we again commend the Committee for its quick and diligent efforts to reform the EEO administrative process at the Department of Veterans Affairs. While we expect that the Federal Employee Fairness Act will offer many of the benefits of H.R. 1032 in addition to other advantages that cannot be achieved at a single agency, H.R. 1032 offers valuable interim improvements in this vital area of life at the Department until the Federal Employee Fairness Act is enacted.

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